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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNISYS CORPORATION,

Petitioner,

v.

CESKA SPORITELNA, A.S.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a party to a contract, which has agreed to arbitrate all disputes arising out of the contract, may avoid arbitration by suing a non-signatory corporate affiliate of the contract party, rather than the corporate entity it contracted with?

PARTIES TO THE PROCEEDING

The petitioner is Unisys Corporation. The information required by Supreme Court Rule 29.6 is set forth in Petitioner's Appendix at 21a.

The respondent is Ceska Sporitelna, a.s., a bank located in the Czech Republic.

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---

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on May 28, 1997.

OPINIONS BELOW

The court of appeals ruled by judgment order (App., *infra*, 19a), affirming the opinion of the district court "essentially for the reasons set forth in the district court's opinion." (App., *infra*, 19a). The opinion of the district court (App., *infra*, 1a) is reported at *Ceska Sporitelna, a.s. v. Unisys Corp.*, C.A. No. 96-4152, 1996 U.S. Dist. LEXIS 15435, (E.D. Pa. Oct. 10, 1996), *aff'd without opinion*, 116 F.3d 467 (3d Cir. 1997). The court of appeals denied Unisys' petition for rehearing or rehearing *in banc*. (App., *infra*, 20a).

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on May 28, 1997. A petition for rehearing or rehearing *in banc* was timely filed on June 11, 1997. The court of appeals entered an order denying petition for rehearing or rehearing *in banc* on July 7, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTE INVOLVED

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, provides that "a written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Section 4 of the FAA permits "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 . . . for an order directing that such arbitration proceed in the manner provided for in such agreement."

STATEMENT OF THE CASE

The central issue in this case is whether the plaintiff, Ceska Sporitelna, a.s. ("CS"), can avoid the contractual arbitration mechanism it agreed to for disputes arising out of its purchase of a complex computer banking system from Unisys International Services, B.V. ("BV"), by suing BV's parent company, Unisys Corporation ("Unisys"), a non-signatory to the contract, for alleged misrepresentations regarding its subsidiary's ability to deliver the computer system.

In June, 1992, CS, a bank located in the Czech Republic, entered into a contract with BV, a wholly-owned lower tier subsidiary of the defendant Unisys, to purchase a complex computer banking system for an estimated $90 million, calculated on a time and materials basis. In 1994, after system design changes were requested by CS, and after a single meeting in Blue Bell, Pennsylvania with officials of Unisys, CS and the subsidiary BV entered into a new contract which superseded the earlier agreement. This second contract fixed the purchase price at $155 million.[1] In both agreements, CS agreed to arbitration as the mechanism for resolving disputes arising out of its purchase of the computer system. The relevant agreements between CS and BV provided that "any disputes as to the interpretation of [the] contract or as to the performance of either party hereunder ... shall [if not resolved by the parties] be settled by arbitration."

Despite difficulties on the project, substantial work was done and significant deliveries were made to CS. Two mainframe computers, worth approximately $70 million, were delivered to CS early in the project and are still in use today. In addition, a significant percentage of the software deliveries under the contract were made, and are still in use at the bank today. During the approximately three year business relationship between the parties, the project was staffed by dozens of employees from various components of the Unisys system.

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1. Unisys Corporation issued a guarantee of the performance of BV under this contract. CS has not sued on this guarantee (which required any suit be filed in London, England under UK law), nor did this guarantee form the basis of the decision of the district court or the court of appeals.

Indeed, many of the alleged misrepresentations in the Complaint were made by employees and officials of Unisys subsidiaries other than the parent Unisys, and the contract party BV.

Rather than bring its claim against BV in arbitration for BV's alleged inability to deliver parts of the computer system consistent with the schedule promised in the relevant contracts, or against numerous other European subsidiaries which had a more significant role than Unisys throughout the project, CS sued Unisys Corporation for alleged fraudulent misrepresentations which induced CS to enter into and remain in the contracts with BV. The alleged misrepresentations amount to little more than alleged oral statements of the representations made by BV in the contract; namely, that BV could provide a working computer banking system pursuant to the schedule set forth in the contract. *See* Complaint ¶ 2 ("The Defendant's misrepresentations and concealments, as specifically described in this Complaint, first persuaded the Plaintiff to select . . . [a] Unisys computer system . . . and then induced the Plaintiff to continue to pay large sums of money to Unisys subsidiaries, and not to terminate its relationship with Unisys."); Complaint ¶ 3 ("It has now become clear that the system cannot and could never have worked in the manner that the Defendant represented it did.") The fraud claim against Unisys is distinguished from a breach of contract claim against BV solely by the identity of the defendant, and the allegation that the alleged inability to perform was known to Unisys prior to the formation of the relevant contracts. Clearly the selection of Unisys as defendant was a tactical decision intended to avoid the contractual arbitration mechanism, and exploit the more liberal discovery and substantive tort standards of United States' courts.

Unisys argued in the district court that under the Third Circuit's opinion in *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110 (3d Cir. 1993), as well as consistent authority in other circuits, arbitration clauses should be extended to non-signatory affiliates of contract parties where the alleged misconduct relates in a tangible way to the contract containing the arbitration clause. The district court held, however,

that under the Third Circuit's decision in *Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d 1287 (3d Cir.), *cert. denied*, — U.S. —, 117 S. Ct. 583 (1996), corporate parents could *never* benefit from arbitration clauses under the non-signatory doctrine set forth in *Pritzker.*

The district court's precise holding was that:

> The case sub judice is more similar to *Dayhoff* than it is to *Pritzker.* As in *Dayhoff* ... the signatory to the Agreement containing the arbitration clause, is a subsidiary of the parent ... the non-signatory ....
>
> ....
>
> We find no support for Unisys's contention [that since the conduct of Unisys and its subsidiaries was "intertwined", this case is governed by *Pritzker]* anywhere in the text of *Dayhoff.* Our reading of *Dayhoff* convinces us that the *decision did not turn on the amount of involvement* [the non-signatories] had with the License Agreement containing the arbitration clause *but solely on the corporate relationship* between [non-signatories and signatories] which the Court refused to disregard. *Since that same corporate relationship is present here, we find that Dayhoff controls.*

Ceska Sporitelna, a.s. v. Unisys Corp., C.A. No. 96-4152, 1996 U.S. Dist. LEXIS 15435, ** 15-17 (E.D. Pa. Oct. 10, 1996) (emphasis added) (App. 9a-10a).

In affirming by judgment order the district court's denial of Unisys petition for arbitration, a panel of the Third Circuit[2] adopted the formalistic reasoning of the district court, stating that:

> After consideration of all contentions raised by the appellant, it is

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2. The court of appeals had jurisdiction pursuant to the Federal Arbitration Act, 9 U.S.C. § 16, which authorizes an immediate appeal as of right from orders of a district court adverse to arbitration.

> ADJUDGED AND ORDERED that the judgment of the district court entered on October 10, 1996, be and is hereby **AFFIRMED,** essentially for the reasons set forth in the district court's opinion.

Order, May 28, 1997 (App. 19a). Unisys Petition for Rehearing or Rehearing *In Banc* was denied on July 7, 1997. (App. 20a).

REASONS FOR GRANTING THE WRIT

Ceska Sporitelna entered into a contract to purchase a Unisys computer system, and agreed that all disputes arising out of the contract would be submitted to arbitration. When a dispute did arise regarding performance of the contract, CS did not submit the dispute to arbitration, but instead made it the basis of a lawsuit in federal district court. CS avoided the arbitration clause by suing an entity in Unisys' multinational structure with which it *did not* contract (and, which, conveniently, is subject to jurisdiction of U.S. courts) rather than the entity with which it did.

If this litigation tactic is tolerated, then the Congressional policy in favor of enforcing arbitration agreements will be rendered meaningless in the circumstance where this Court has treated it as most important—disputes arising out of international business transactions. It is a staple of international commerce for United States corporations to act and to *contract* through foreign subsidiaries; indeed, it is often a legal requirement of the country in which business is to be performed that the United States corporation do so.

Because corporate affiliates of contract parties are convenient targets of litigants attempting to avoid arbitration clauses, most federal circuits have adopted a practical rule, grounded in principles of contract, agency, and estoppel, which extends arbitration clauses to non-signatory affiliates where the conduct alleged against the non-signatory is intertwined with the contract which contains the arbitration agreement. There is, in fact, authority for this proposition in the Third Circuit from which this case arises. There is no reasoned basis, and there was no authority (until the Third Circuit affirmed the district court's reasoning in this case) for the proposition that the prudential doctrine pursuant to which arbitration clauses are extended to non-signatory affiliates of contract parties is suspended when the non-signatory is a corporate parent of the contract party.

This Court should intervene to cure this aberration in the circuits. Multinational corporations entering agreements through subsidiaries in foreign countries must be able to fore-

cast at the time they contract whether the dispute mechanism intended for the project is the one that will in fact be compelled when a dispute arises. If the rule adopted by the Third Circuit — disputes arising out of a contract containing an arbitration clause will not be submitted to arbitration if the suit is plead against the parent corporation of a contract party — is allowed to stand, there will be no practical mechanism for multinational corporations to prospectively channel disputes arising out of international transactions to arbitration.

I. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH OPINIONS IN OTHER CIRCUITS

The Federal Arbitration Act treats arbitration clauses as "valid, irrevocable, and enforceable" in Federal district courts. 9 U.S.C. §§ 2, 4. Virtually every circuit that has considered the issue of whether parties to contracts containing arbitration clauses subject to the Federal Arbitration Act can plead around that commitment by suing parties affiliated with the contract party, rather than the contract party itself, has adopted some version of the practical doctrine extending arbitration clauses to affiliated non-signatories. *See, e.g., Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773 (2d Cir. 1995); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110 (3d Cir. 1993); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988); *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679 (5th Cir. 1976); *Arnold v. Arnold Corp.-Printed Communs. for Bus.*, 920 F.2d 1269 (6th Cir. 1990); *In re Oil Spill By the "Amoco Cadiz", etc.*, 659 F.2d 789 (7th Cir. 1981); *Britton v. Co-Op Banking Group*, 4 F.3d 742 (9th Cir. 1993); *Sunkist Soft Drinks v. Sunkist Growers*, 10 F.3d 753 (11th Cir. 1993), *cert. denied*, 513 U.S. 869 (1994); *cf. McCarthy v. Azure*, 22 F.3d 351 (1st Cir. 1994) (recognizing non-signatory doctrine based on contract and agency principles, but declining to apply it to claim of fraud against non-signatory corporate officer involved in asset transfer transaction). A similar rule has developed to protect the sanctity of forum selection clauses. *See Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509 (9th Cir. 1988).

In those cases where non-signatories petition for arbitration, the unifying principle underlying the determination of arbitrability has been the *relationship of the alleged conduct* of the non-signatory *to the contract* containing the arbitration clause. If the alleged wrongful conduct relates to the contract containing the arbitration clause, the arbitration clause is extended to the non-signatory. *See Britton*, 4 F.3d at 747 (the key issue was whether the non-signatory's alleged wrongdoing "relate[s] to or arise[s] out of the contract containing the arbitration clause"); *Sunkist Soft Drinks*, 10 F.3d at 757-58 ("The focus of our inquiry should be on the nature of the underlying claims asserted by Sunkist against Del Monte."); *J.J. Ryan & Sons*, 863 F.2d at 320-21 ("When the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement."); *Thomson-CSF, S.A.*, 64 F.3d at 779-80 (although declining to do so on the facts, court recognized that extending arbitration clause to non-signatory parent company was appropriate when the claims against the parent company are integrally related to the contract containing the arbitration clause); *Goodwin v. Ford Motor Credit Co.*, 970 F. Supp. 1007, 1016-17 (M.D. Ala. 1997) ("What is necessary is that the claim against the nonsignatory be inextricably bound up with the terms and duties of the contract the plaintiff has signed with the other defendant."); *Gulf Guar. Life Ins. Co. v. Connecticut Gen. Life Ins. Co.*, 957 F. Supp. 839, 841-42 (S.D. Miss. 1997) ("The Court finds that the doctrine of equitable estoppel should apply in cases in which a non-signatory seeks to enforce an arbitration agreement against a signatory to that agreement where the non-signatory is an agent of a signatory or where the claims against the non-signatory are 'intimately founded in and intertwined with' the agreement containing the arbitration clause.") (citation omitted); *Usina Costa Pinto, S.A. Acucar E Alcool v. Louis Dreyfus Sugar Co.*, 933 F. Supp. 1170, 1179 (S.D.N.Y. 1996) (since the obligations under contract containing arbitration clause were at the heart of the fraud claim, and because the parent had played a significant role in the formation and

execution of the contracts, it was entitled, despite its status as non-signatory, to invoke the arbitration clause); *Vitzethum v. Dominick & Dominick, Inc.*, Nos. 94 Civ. 4938, 95 Civ. 429, 1996 WL 19062, ** 5-7 (S.D.N.Y. Jan. 18, 1996) (claims against non-signatory parent company for allegedly fraudulently inducing plaintiffs to enter into investment contracts with the parent's corporate subsidiaries were arbitrable); *Prograph Int'l v. Barhydt*, 928 F. Supp. 983, 990-91 (N.D. Cal. 1996) (agency principles mandated submitting the plaintiff's employment related tort and contract dispute against a subsidiary of the contracting party to arbitration in light of the fact that the allegations against the subsidiary did not diverge substantially from those against the parent company); *cf. Manetti-Farrow, Inc.*, 858 F.2d at 514 n.5 ("[T]he alleged conduct of the non-parties is so closely related to the contractual relationship that the forum selection clause applies to all defendants."); *Texas Source Group v. CCH, Inc.*, 967 F. Supp. 234, 237 (S.D. Tex. 1997)("[Non-signatory's] relationship with the plaintiffs and the defendants is so inextricably intertwined that he should be subject to the forum-selection clause.") [3]

This practical rule regarding arbitrability of disputes against non-signatories has been developed to insure against the avoidance of agreed upon dispute resolution mechanisms through clever pleading. *See "Amoco Cadiz"*, 659 F.2d at 796; *see also McBro Planning and Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342, 344 (11th Cir. 1984) ("[I]t is well

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3. The practical test for determining the arbitrability of disputes against non-signatories has also been adopted in state courts. *See Carlin v. 3V Inc.*, 928 S.W. 2d 291 (Tex. Ct. App. 1996). Following the federal authorities, the court in *Carlin* described the proper analysis as follows:

> *J.J. Ryan, McBro, Hughes, and Sunkist*, were all decided on the same ultimate fact, that each party must rely on the terms of the written agreement in asserting their claims. The focus of the inquiry in each of these cases was on the nature of the underlying claims asserted by the party resisting arbitration and to determine whether these claims were within the scope of the arbitration clause contained in the agreement.

Id. at 296; *cf. Lu v. Dryclean-U.S.A. of California, Inc.*, 14 Cal. Rptr. 2d 906, 908 (Ct. App. 1992) (forum selection clause enforced in favor of non-signatories because the conduct alleged against them "is closely related to the contractual relationship").

established that a party may not avoid broad language in an arbitration clause by attempting to cast its complaint in tort rather than contract."); *Sam Reisfeld & Son Import Co.*, 530 F.2d at 681 ("If the parent corporation was forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted."); *Chase v. Check*, 158 F.R.D. 59, 63 (E.D. Pa. 1994)("[The non-signatory] rule ... makes sense because if plaintiffs 'can avoid the practical consequences of an agreement to arbitrate by naming non-signatory parties as defendants ... the effect of the rule requiring arbitration would, in effect, be nullified.' ") (citation omitted); *Vitzethum*, 1996 WL 19062 at * 7 ("Plaintiffs cannot escape enforcement of the arbitration agreement simply by suing the parent, [non-signatory], rather than [the subsidiary non-signatory]."); *see also* Scott M. McKinnis, *Enforcing Arbitration With a Nonsignatory: Equitable Estoppel and Defensive Piercing of the Corporate Veil*, 1995 J. Disp. Resol. 197, 211 (1995) ("[A] corporation will not be allowed to avoid the effects of an arbitration clause based on the nonsignatory status of defendant while simultaneously asserting claims against the nonsignatory party arising from the same contract."); *cf. Lu*, 14 Cal. Rptr. 2d at 908 ("To hold [that the fact that the non-signatories did not sign the Agreement renders the forum selection clause unenforceable] would be to permit a plaintiff to sidestep a valid forum selection clause simply by naming a closely related party who did not sign the clause as a defendant.")

In instances where the alleged tort or fraud is linked to performance under or negotiation of the contract containing the arbitration clause, courts have routinely found that the practical test for extending arbitrability to non-signatories has been met. *See Sunkist Soft Drinks*, 10 F.3d at 758 ("It is well established that a party may not avoid broad language in an arbitration clause by attempting to cast its complaint in tort rather than contract.")(citation omitted); *Usina Costa*, 933 F. Supp. at 1179 ("[B]ecause of ... the integral link between the fraud claim and the underlying contractual obligations [the] nonsignatory may invoke the arbitration clause."); *cf. Lu*, 14 Cal. Rptr. 2d at 908 (non-signatories alleged to have partici-

pated in the fraudulent representations which induced plaintiffs to enter into the agreement are bound by forum selection clause in agreement).

The non-signatory doctrine appeared to be the law in the Third Circuit as well. In *Pritzker,* that court held that defendant Merrill Lynch Asset Management should benefit from an arbitration clause in the agreement between plaintiffs and its corporate affiliate Merrill Lynch. In so holding, the Court applied "agency logic" to the allegations in the complaint, focusing on the overlap between the alleged conduct of the signatory and non-signatory. *Pritzker,* 7 F.3d at 1122. The Court concluded by observing that "[w]here the parties to [an arbitration clause] unmistakably intend to arbitrate all controversies which might arise between them, their agreement should be applied to claims against agents or *entities related to the signatories." Id.* (emphasis added).

The non-signatory doctrine was addressed again in the Third Circuit's decision in *Dayhoff,* which held that the interconnectedness or agency relationship necessary to extend an arbitration clause to a non-signatory is not proved *solely* by the presence of a parent/subsidiary corporate relationship. In that case, the corporate parent which was the primary focus of the court's opinion had neither negotiated nor performed under the contract containing the arbitration clause, and became a participant in the relevant business relationships after the contract containing the arbitration clause had been terminated. This circumstance distinguishes *Dayhoff* from *Pritzker* and the other federal court decisions because, unlike in those cases, the claims against the corporate parent were not "intimately founded in and intertwined with" the contract containing the arbitration clause. *Sunkist Soft Drinks,* 10 F.3d at 758.

The district court holding adopted by the panel largely ignored *Pritzker* and relied on *Dayhoff,* solely because the relationship between the non-signatory and signatory in the instant case — parent/subsidiary — was identical to that of the non-signatory and signatory in *Dayhoff.* The district court failed to state a principled distinction between the

parent/subsidiary corporate relationship and the affiliate corporate relationship in *Pritzker* that would justify making the parent/subsidiary relationship determinative of arbitrability of the dispute. Numerous courts have extended arbitration clauses to non-signatories linked to the contract party by a parent/subsidiary relationship. *See, e.g., Sunkist Soft Drinks,* 10 F.3d at 757-58; *J.J. Ryan & Sons, Inc.,* 863 F.2d at 320-21; *Vitzethum,* 1996 WL 19062 at * 7; *In re Salomon Inc. Shareholders Derivative Litig.,* No. 91 Civ. 5500 (RPP), 1995 WL 533595, ** 5-6 (S.D.N.Y. Sept. 30, 1994); *cf. Manetti-Farrow, Inc.,* 858 F.2d at 514 n.5 (applying forum selection clause to non-signatory parent corporation). Indeed, in its brief before the court of appeals, respondent never argued that corporate relationship alone should determine arbitrability.

II. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THIS COURT'S INTERPRETATION OF THE FEDERAL ARBITRATION ACT

This Court has interpreted the Federal Arbitration Act, 9 U.S.C. § 1, *et. seq.,* to be "a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24 (1983). "[A]s with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626 (1985).

The district court, whose holding and reasoning the Court of Appeals adopted, exercised formalistic reasoning that in fact defeats the contracting parties' intention to arbitrate disputes arising out of the contract. The district court refused to apply the non-signatory doctrine articulated in *Pritzker,* and numerous cases outside the Third Circuit, because, citing *Dayhoff,* it refused to disregard the corporate structure that makes parent and subsidiary corporations different legal entities. *Ceska Sporitelna,* 1996 U.S. Dist. Lexis 15435 at *16.

This reasoning ignores the fact that CS has disregarded the corporate structure by pleading its lawsuit against a mem-

ber of the multinational corporation with which it did not contract, rather than the one with which it did. CS seeks to treat Unisys Corporation and its subsidiaries as one enterprise for purposes of liability, but as distinct juridical entities when interpreting the application of the arbitration commitment. It will always be the case that in transactions involving multi-tiered corporations, there will be participation and oversight by corporate entities affiliated with the contract parties. In this transaction, there was such involvement by numerous European subsidiaries, non-parties to the contract, from the very beginning of the transaction through the termination of the contract. That involvement was expanded to address problems on the project, as Unisys marshaled its institutional resources in an effort to preserve the relationship. If the lower court's formalistic reading of the contract — that only signatories can benefit from the arbitration clause — is correct, it means that Unisys, by involving non-contract subsidiaries, discarded its right to arbitration at the outset of the contract, and through its efforts to salvage the project.[4] Such a counterintuitive and counterproductive circumstance exposes the defect in the lower court's rigid and formalistic reasoning.

The non-signatory doctrine developed by the lower federal courts is a practical rule that accommodates common business practice, and is consistent with this Court's position that the parties' "intentions are generously construed as to issues of arbitrability." The non-signatory doctrine serves business expectations and fundamental fairness by insuring that the primary intention of the parties to an arbitration agreement — that *all disputes* arising out of the contract be arbi-

4. For example, a primary delivery under the original contract was the mainframe computers, comprising $70 million of the estimated total of $90 million under the contract. These mainframe computers were developed and manufactured by Unisys Corporation; nobody could ever have been working under the delusion that the small subsidiary BV had either the personnel or the facilities to assemble these deliveries. Yet under the formalistic approach taken by the lower courts and advanced by CS, any disputes regarding those mainframes could be raised against Unisys in any forum with jurisdiction over the parties, despite the fact that they were sold as part of a contract containing an arbitration clause.

trated — is not defeated by the availability of a corporate affiliate as a litigation target. Moreover, courts that recognize the non-signatory doctrine have applied it with sensible limitations so that a non-signatory can only benefit from the arbitration provision in a contract when the misconduct alleged against the non-signatory arises out of the contract. *See Thomson-CSF, S.A.*, 64 F. 3d at 780 (claim that parent purchased signatory subsidiary in order to eliminate plaintiff which had exclusive agreement to supply equipment with subsidiary "can hardly be characterized as arising out of or being integrally related to the ... Agreement"); *Britton*, 4 F.3d at 748 ("[A]cts [alleged] are subsequent, independent acts of fraud, unrelated to any provision or interpretation of the contract.")

Here, the complaint alleges misconduct almost indistinguishable from a claim alleging breach of the contract containing the arbitration clause. The alleged misrepresentations amount to little more than oral versions of the representations made by BV in the contract; namely, that BV could provide a working computer banking system pursuant to the schedule set forth in the contract. Complaint ¶ 3 ("It has now become clear that the system cannot and could never have worked in the manner that the Defendant represented it did.") Since CS "must rely on the terms of the written agreement in asserting [its] claims," *Carlin*, 928 S.W. 2d at 296, it must also be bound to the dispute resolution mechanism in that agreement.

III. THE COURT OF APPEALS' DECISION UNDERMINES PREDICTABILITY IN INTERNATIONAL BUSINESS TRANSACTIONS

This Court has previously stated that the "federal policy [in favor of arbitral dispute resolution] applies with special force in the field of international commerce." *Mitsubishi Motors Corp.*, 473 U.S. at 631. The reason that the Court placed special emphasis on arbitration clauses in the international context is that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is ... an almost indispensable precondition

to achievement of the orderliness and predictability essential to any international business transaction." *Id.* (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974)).

In cases enforcing both arbitration agreements and forum selection clauses, this Court has emphasized the importance of prospective certainty about dispute mechanisms for participants, both domestic and foreign, in the international business community. *Scherk*, 417 U.S. at 517; *see also, M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 11-12 (1972) ("Not surprisingly, foreign businessmen prefer, as do we, to have disputes resolved in their own courts, but if that choice is not available, then in a neutral forum with expertise in the subject matter.")

The rule articulated by the district court and adopted by the court of appeals works in opposition to the principles of predictability and consistency emphasized by this Court, a circumstance which, if allowed to persist, will cast a chill over international business relationships. *See Scherk*, 417 U.S. at 517 ("[T]he dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of business to enter into international commercial agreements.") Since corporate affiliates of contract parties will often oversee or provide personnel in support of complex business projects, and, in any event, can easily be alleged to have done so, prospective efforts to channel disputes to arbitration will be dependent on the parties' whims, not legal enforcement.

The only way that multinational corporations could avoid the "end around" the arbitration clause effected by CS here would be, as the court of appeals suggested during argument, to have every branch, division and affiliate of the multinational corporation sign the contract containing the arbitration clause, or to simply discard the subsidiary and export directly from the parent corporation's home state into the foreign country. Such a suggestion is impracticable given the legal, regulatory, and tax consequences that would result, and it would mean, in effect, that corporate entities that the law has allowed to act independently, must always act in unison in order for contractual disputes to be subject to arbitration. Cor-

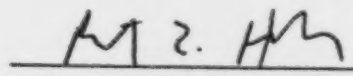
porations typically provide services and products in foreign countries through a subsidiary located in that country, rather than simply exporting into the foreign country, either because that local presence is required by the host state, or because tariffs have been set so high that, as a practical matter, local production is a requirement of doing business. P.T. Muchlinski, *Multinational Enterprises and the Law 44-45 (1995);* Cynthia Day Wallace, *Legal Control of the Multinational Enterprise* 69 (1982). If multinational corporations must have all constituents become signatories to every agreement, or become the principals in every agreement, they will be unable to compete in foreign markets under the rules set by foreign governments.

Where a legal rule causes business entities to act contrary to rational competitive business practice — as the Third Circuit's neutering of the non-signatory doctrine threatens here — the legal rule bears examination. Where the majority of courts have developed a contrary legal doctrine that dovetails with business practice, the inconsistent legal rule must be discarded. *See Bulova Watch Co. v. K. Hattori & Co.,* 508 F. Supp. 1322, 1327 (E.D.N.Y. 1981)(Judge Weinstein) ("We tend to come closer to the mark when we examine a business relationship from the practical viewpoint of businessmen rather than through the distorting lens of a legal conceptual framework established in an earlier era.")

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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1996 U.S. Dist. LEXIS 15435 printed in FULL format.

CESKA SPORITELNA, a.s. VS. UNISYS CORPORATION

C.A. NO. 96-4152

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1996 U.S. Dist. LEXIS 15435

October 10, 1996, Decided

October 10, 1996, FILED

DISPOSITION: [*1] Motion of the defendant to compel arbitration DENIED. Motion of the defendant to dismiss DENIED.

COUNSEL: For CESKA SPORITELNA, a.s., PLAINTIFF: J. BRUCE MC KISSOCK, MC KISSOCK & HOFFMAN, P.C., PHILA, PA USA. ROBERT J. KALER, GADSBY & HANNAH, BOSTON, MA USA.

For UNISYS CORPORATION, DEFENDANT: ROBERT L. HICKOK, PEPPER, HAMILTON & SCHEETZ, PHILA, PA USA. LAWRENCE P. BYRNES, UNISYS CORPORATION, BLUE BELL, PA USA.

JUDGES: CHARLES R. WEINER

OPINION BY: CHARLES R. WEINER

OPINION: MEMORANDUM OPINION AND ORDER

WEINER, J.

OCTOBER 10, 1996

This is a civil action for fraud in which the plaintiff, Ceska Sporitelna, a.s. ("CS"), the largest savings bank in the Czech Republic, seeks to recover substantial damages from the defendant Unisys Corporation ("Unisys") as a result of a series of fraudulent misrepresentations allegedly made by Unisys to CS. Specifically, CS contends that Unisys's alleged misrepresentations and "first persuaded [CS] to select an

unproven, unfinished, and largely unworkable Unisys computer system . . . , and then induced [CS] to continue to pay large sums of money to Unisys subsidiaries, and not to terminate its relationship with Unisys, when the insoluble problems with that [*2] computer systems began to manifest themselves." Complaint at P 2. Presently before the court is the petition of Unisys to compel arbitration pursuant to section 4 of the Federal Arbitration Act, *9 U.S.C.* § 4 or, in the alternative, to dismiss for failure to join necessary and indispensable parties, for failure to state a claim upon which relief can be granted and under the doctrine of forum non conveniens. For the reasons which follow, both the petition to compel arbitration and the motion to dismiss are denied.

OVERVIEW OF THE COMPLAINT

CS is a privatized retail banking institution organized under the laws of the Czech Republic with its principal place of business in Prague, and branch offices throughout the Czech Republic. Complaint at P 4. As part of its effort to modernize its operations to enable it to compete in the retail banking environment of its developing free market economy, CS decided in 1991 to procure and install a new computer system which would allow it to conduct most of its retail banking electronically. Id. at PP 8-9. CS sought information on the availability of such systems from a number of Western computer companies, including Unisys, a Delaware [*3] corporation with its principal place of business in Blue Bell, Pennsylvania. Id. at PP 5, 10.

The Complaint alleges that in the summer of 1991, CS invited a number of computer companies, including Unisys, to respond to questions concerning the characteristics of the electronic banking systems that they proposed to supply to CS. Id. at 11. In November of 1991, Unisys presented to CS a written document entitled "RESPONSE TO QUESTIONS FROM CZECH STATE SAVINGS BANK, CSFR", in which Unisys made a number of glowing representations about the computer system ("the System") that it proposed to supply to CS, including that the System was a proven, workable, state of the

art system that could be supplied within the time frame contemplated by CS. Id. at PP 11-12, 14.

The Complaint further alleges that in 1992, Unisys gave a misleading demonstration of the "Octagon" portion of the System to CS in Uxbridge, England. Id. at PP 19, 21. Thereafter, in February of 1992, a Unisys representative, Hugo Simpson, made a further presentation at CS in which he misrepresented to CS that Unisys's "banking systems were installed in approximately 40 out of 52 leading world banks." Id. at P [*4] 20.

The Complaint alleges that in reliance on these representations and demonstrations, CS, on February 28, 1992, agreed to pay approximately $ 450,000 to a Unisys subsidiary, Unisys World Trade Inc., ("World Trade") to obtain introductory consulting services, training and a management and technical report in preparation for the delivery of the System. Id. at P 21. Following another presentation during which Unisys representatives Stephen Williams, Jan Necas, and John Thompson, repeated previous written and oral representations concerning the System, CS agreed, in June of 1992, to pay an estimated $90,000,000 to a second Unisys subsidiary, Unisys International Services, BV, ("BV") to implement the delivery to CS of the System. Id. at PP 22-23.

In September, 1993, CS advised James Unruh, the Chairman and CEO of Unisys, that the System was not working properly. Id. at P 24. On September 23, 1993 and again on October 8, 1993, Unruh responded by reassuring CS "that a Unisys team of experts had identified the nature of the fault, and that Unisys was working on a remedy, and that he was confident that the resolution would be available in a short period of time." Id at [*5] P 25.

Because the problems continued, senior representatives of CS met with senior officials of Unisys at Unisys's Blue Bell headquarters on January 12, 1994. Id. at P 26. At that meeting, Unruh expressly represented to CS, inter alia, that the installation of the System was a Unisys project and that Unisys "would guarantee that the problems were solved and that

CS was satisfied with the System." Id. at P 27. In a document dated January 12, 1994, Unisys put this guarantee in writing. Id. at P 29.

The Complaint alleges that Unisys made the misrepresentations at the meeting on January 12, 1994 "in order to conceal the fraudulent nature of its previous misrepresentations to CS about the Unisys System, to induce CS not to terminate its relationship with Unisys, and to misled CS into paying more money to Unisys subsidiaries in a futile effort to complete the installation of the Unisys System, which Unisys knew could not work in the manner represented." Id. at P 31. In reliance on these alleged misrepresentations, CS, on March 31, 1994 entered into a new contract with BV ("the 1994 Agreement") pursuant to which CS made payments to BV for the completion of the System. [*6] Id. at P 32. In early 1995, CS, after finally realizing that the System was never going to work, terminated its relationship with Unisys. Id. at P 33.

The complex relationship between Unisys and its subsidiaries is detailed in the unrefuted affidavit of Ronald Anderson, Unisys's Assistant Secretary. According to the affidavit, World Trade, a Delaware corporation with offices in Florida, England and Singapore, is a wholly-owned subsidiary of Unisys. Anderson affidavit at P 3. BV, a Dutch corporation with its principal place of business in the Netherlands, is owned by Unisys Holding Corporation and by Unisys Investments SA ("SA"). Id. at P 4. SA is a Swiss company and a wholly-owned subsidiary of Unisys Holding Corporation. Id. at P 5. Unisys Holding Corporation is a Delaware corporation and a wholly-owned subsidiary of Unisys. Id. at P 6. Unisys Europe Africa Limited ("UEAL") is an English corporation with its principal place of business in Uxbridge, England. Id. at P 7. Prior to July 1, 1996, UEAL was owned by both SA and by Unisys Holding Corporation. Id. After July 1, 1996, both SA and Unisys Holding Corporation sold their stakes in UEAL to Unisys Holdings, [*7] an English corporation. Id. at P 8. Unisys Holdings is a different company from Unisys Holding Corporation. Id. Unisys Holdings is owned by Unisys Holding Corporation, BV and by Unisys in trust for

Unisys Holding Corporation. Id. The affidavit avers that as a result, all of the above corporations are owned by Unisys, either directly or through wholly-owned subsidiaries. Id. at P 9.

PETITION TO COMPEL ARBITRATION

Unisys argues that an arbitration clause contained in the 1994 Agreement between CS and BV requires CS and Unisys to arbitrate CS's fraud claim against Unisys. That clause provides, inter alia, that any disputes which the parties cannot settle privately "shall be settled by arbitration unless otherwise disposed of by agreement between the parties" and that "any award of the arbitrators shall be final and binding." Appendix to Defendant Unisys Corporation's Memorandum of Law in Support of its Petition to compel Arbitration, Exhibit 4, P 27.2, p. 45. The clause further provides that the rules governing any arbitration will be the United Nations Commission of International Trade Law ("UNCITRAL") Arbitration Rules. Id., P 27.3, p.45. The forum for [*8] arbitrating any disputes between CS and CV is Vienna, Austria. Id., P 27.12, p. 46.

CS responds that since Unisys was not a signatory to the 1994 Agreement, there was never any agreement between CS and Unisys to arbitrate CS's fraud claim against Unisys. In further support of this contention, CS cites the affidavit of its Vice-Chairman of the Board, Karel Kotrba, in which Dr. Kotrba avers, inter alia, that in the 1994 Agreement, CS "agreed to arbitrate only disputes between itself and the party with whom it was contracting. . ." Kotrba affidavit at P 4 (emphasis in original). Kotrba also avers that "CS never even considered entering into an agreement with Unisys Corporation to arbitrate [fraud] claims" and "never entered into any agreements with Unisys Corporation to arbitrate any claims" Id. at P 9 (emphasis in original).

Although Unisys admits it was not a signatory to the 1994 Agreement between CS and its subsidiary, BV[1], Unisys argues

1. Unisys's Memorandum of Law in Support of its Petition to Compel Arbitration at 14.

that it is nevertheless entitled to invoke the arbitration clause in that Agreement and arbitrate the dispute sub judice based on the holding of our Court of Appeals in *Pritzker v. Merrill, Lynch, Pierce, Fenner & [*9] Smith, 7 F.3d 1110 (3d Cir. 1993)*. CS responds that the holding in Pritzker was quite narrow and that pursuant to the more recent authority of our Court of Appeals in *Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503 (3d Cir 1994)*, aff'd, *First Options of Chicago, Inc. v. Kaplan, 131 L. Ed. 2d 985, 115 S. Ct. 1920 (1995)* and *Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287 (3d Cir. 1996)*, the petition to compel arbitration must be denied.

Section 2 of the Federal Arbitration Act provides:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and unenforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. Section 4 of the [*10] FAA requires a district court to order the parties "to proceed to arbitration in accordance with the terms of the agreement" when a party refuses to participate in arbitration. When considering a petition to compel arbitration which, as here, is opposed on the ground that no agreement to arbitrate had been made between the parties, we "should give the opposing party the benefit of all reasonable doubts and inferences that may arise." *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51, 54 (3d Cir. 1980)*.

In Pritzker, the trustees of a pension plan brought an action against their brokerage firm, one of its financial consultants, and a sister corporation for various ERISA violations. Although the plaintiffs had an arbitration agreement with the brokerage firm only, our Court of Appeals also compelled arbitration of the claims against the employee and the sister corporation as well, despite their absence as signatories to the arbitration agreement. The Court of Appeals reasoned that "because a principal is bound under the terms of a valid arbi-

tration clause, its agents, employees, and representatives are also covered under the terms of such agreements." *7 F.3d at 1121. [*11]*

Following Pritzker, our Court of Appeals, in Kaplan, held that the Kaplans could not be compelled to arbitrate claims made pursuant to various contracts because they individually had not signed the specific contract containing the arbitration clause, although they had signed related contracts. *Kaplan, 19 F.3d at 1516.* The Court distinguished Pritzker by observing that in Pritzker, the question was whether persons who acted wrongfully on behalf of their principal or without its authority could be compelled to arbitrate under an arbitration agreement the principal had signed and therefore Pritzker simply involved an application of "agency principles". *19 F.3d at 1514.*

In affirming our Court of Appeals, the Supreme Court wrote:

Arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.

First Options, 115 S. Ct. at 1924. (citations omitted). The Court went on to state:

After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but [*12] to ensure that commercial arbitration agreements, like other contracts, 'are enforced according to their terms.'

Id. at 1925 (citations omitted).

In Dayhoff, Dayhoff, Inc. and Heinz Dolciaria S.p.A. were the assignees to a License Agreement pursuant to which Dayhoff was granted the exclusive license to make and sell certain candy in the United States. The License Agreement contained an arbitration clause which provided that, inter alia, all controversies arising from the License Agreement would be settled by an international arbitration tribunal. Heinz Dolciaria was a subsidiary of Heinz Italia S.p.A., which, in turn, was a subsidiary of H.J. Heinz Co. Following termination of the License Agreement by Heinz Italia, Dayhoff brought

suit against, inter alia, Heinz Dolciaria, Heinz Italia and H.J. Heinz. The district court dismissed all the claims relating to the License Agreement because of the arbitration clause in that Agreement. Citing the opinions in Kaplan as controlling precedent, our Court of Appeals found that the arbitration clause in the License Agreement "can be enforced only by the signatories to [that] Agreement." *Dayhoff 86 F.3d at 1296.* [*13] The Court further stated:

Nor do we believe any of the other cases cited by appellees are persuasive here, as those cases all may be distinguished from that before us.[2] We also point out that Heinz Italia and H.J. Heinz should not by reason of their corporate relationship with Heinz Dolciaria be able to invoke the arbitration clause[s], for there is no more reason to disregard the corporate structure with respect to such claims as there would be to disregard it with respect to other legal matters. If Heinz Italia and H.J. Heinz wanted to be able to invoke the arbitration clause[s], they should have directed Heinz Dolciaria to include appropriate language in the 1989.. agreement[s] allowing them to do so.

Id. (emphasis added). In an amendment to its opinion, the Dayhoff Court distinguished Pritzker as follows:

. . . our holding in Pritzker does not alter our decision here. In that case, we affirmed the idea that 'because a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under the terms of such agreements.' [citations omitted] We also held there that an [*14] arbitration agreement between pension plan trustees and a securities broker applied to the broker's sister corporation that acted as the broker's adviser and that allegedly participated knowingly in breaches of fiduciary

2. One of these cases is also cited by Unisys in its brief in support of it petition to compel arbitration. *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-21 (4th Cir 1988)* ("When the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement.")

duties owed to the plan. Even though the sister corporation had not signed the arbitration agreements, we applied agency logic in finding that the sister corporation's interests were directly related to, if not predicated upon, the broker's conduct and that the trustee's claims against it were therefore subject to compulsory arbitration. Clearly, this agency theory is not applicable to the facts before us.

Dayhoff (Amend. to Op.), 1996 U.S. App. LEXIS 18266 at 1-2 (July 24, 1996) (emphasis added).

[*15]

Thus, Pritzker constitutes an exception to the general rule that only signatories to a contract can be bound by an arbitration clause found within the contract by holding that where the non-signatories are agents, employees or representatives of their principal who is a signatory to the contract and the agent's interests are co-extensive with those of its principal, the non-signatories are still bound by the arbitration clause. In Dayhoff, on the other hand, there was no principal/agent relationship between the non-signatories, H.J. Heinz Co. and Heinz Italia, and the signatory Heinz Dolciaria but rather a parent/subsidiary corporate relationship which the Court of Appeals refused to disregard. Accordingly, H.J. Heinz and Heinz Italia, as the parent corporations, were not bound by the arbitration clause in the License Agreement which was signed by only the subsidiary, Heinz Dolciaria.

The case sub judice is more similar to Dayhoff than it is to Pritzker. As in Dayhoff, CV (Heinz Dolciaria), the signatory to the Agreement containing the arbitration clause, is a subsidiary of the parent Unisys (Heinz Italia, HJ Heinz), the non-signatory. There is simply no principal/agent [*16] relationship present between Unisys and CV as there was between the brokerage firm and its financial consultant/sister corporation in Pritzker. Nor has CS asserted any claims in this action against any agents, representatives or employees of Unisys. It follows that, as in Dayhoff, Unisys "should not by reason of [its] corporate relationship with [CV] be able to invoke the arbitration clause[s] [in the 1994 Agreement between CS and BV], for there is no more reason to disregard the corporate

structure with respect to such claims as there would be to disregard it with respect to other legal matters." *86 F.3d at 1296.* As in Dayhoff, if Unisys "wanted to be able to invoke the arbitration ... clause[s], [it] should have directed [BV] to include appropriate language in [those] agreements allowing [it] to do so." Id.

Unisys contends that the Court of Appeal's decision in Dayhoff not to follow Pritzker and allow the non-signatories to invoke the arbitration clause in the License Agreement was based not simply on the fact that they were the parent companies of Heinz Dolciaria but because neither H.J. Heinz nor Heinz Italia had any "meaningful connection [*17] to the license agreement containing the arbitration clause." Unisys's Memorandum of Law in support of its Petition to Compel Arbitration at 19. Unisys claims that since the conduct of Unisys and its subsidiaries was "intertwined", this case is identical to Pritzker.

We find no support for Unisys's contention anywhere in the text of Dayhoff. Our reading of Dayhoff convinces us that the decision did not turn on the amount of involvement H.J. Heinz and Heinz Italia had with the License Agreement containing the arbitration clause but solely on the corporate relationship between H.J. Heinz and Heinz Italia and Heinz Dolciaria which the Court refused to disregard. Since that same corporate relationship is present here, we find that Dayhoff controls. Indeed, it appears from the Pritzker, Kaplan and Dayhoff line of cases that only where the signatories and non-signatories first share a principal/agent relationship does it matter whether the non-signatories and signatory's interests are co-extensive so as to make the arbitration clause applicable to the non-signatory.

Pursuant to the Kaplan opinions and the Dayhoff decision, we find that since Unisys was not a [*18] signatory to the 1994 Agreement and therefore there was no agreement between CS and Unisys to submit this dispute to arbitration, the petition of Unisys to compel arbitration must be denied.

MOTION TO DISMISS

Having denied Unisys's petition to compel, we now consider Unisys's motion to dismiss. Unisys makes a number of arguments why this action should be dismissed, all of which are without merit.

Unisys first argues that this action must be dismissed because CS has failed to join necessary and indispensable parties. Specifically, Unisys contends that CS has failed to name as defendants World Trade and BV, the subsidiaries who actually contracted with CS. Unisys argues that since "BV is a Dutch corporation which cannot be joined in this action, and because BV is indispensable to this action, the action must be dismissed pursuant to Fed.R.Civ.P. 19." Unisys's Memorandum of Law at 23. We do not agree.

Rule 19(a) of the Federal Rules of Civil Procedure provides:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in [*19] the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the parties already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

If a prospective party falls into either of the above two categories, but may not be joined because jurisdiction would be destroyed, the court must determine under Rule 19(b) whether "in equity and good conscience" the action should proceed without the absent party or whether the absent party is indispensable and the action should be dismissed. *Steel Valley Authority v. Union Switch and Signal Division, 809 F.2d 1006, 1013 (3d Cir. 1987).* We need only reach subsection (b) if we first determine that the absent party is a necessary party under subsections (a)(1) or (2).

Neither CV nor World Trade are necessary parties under Rule 19(a)(1). CS has [*20] brought a fraud action against Unisys, the parent of CV and World Trade based on Unisys's alleged misrepresentations to CS. The Complaint does not contain any allegations of fraud against CV or World Trade. Rather, according to the allegations in the Complaint, it appears the only cause of action CS would have against these subsidiaries is one for breach of contract which, according to those contracts, would be subject to arbitration. Neither World Trade nor CV has a claimed or apparent interest in the same relief sought by CS against Unisys. In addition, Unisys does not need either World Trade or CV to be added as parties in order to be able to defend itself against CS's claim for fraud. As a result, complete relief on CS's fraud claim against Unisys can be accorded without CV and World Trade being added as parties.

Nor are CV or World Trade necessary parties under Rule 19(a)(2). As noted above, this action is simply one for fraud against the parent of CV and World Trade. The Complaint contains no allegations of fraud against either CV or World Trade. Therefore, adjudication of this action will not, as Unisys contends, involve determinations as to the conduct of the Unisys subsidiaries. [*21] CV and World Trade simply do not have any interest in this fraud action which would require that they be added as parties.

The absence of World Trade and CV will not expose Unisys to the substantial risk of double or inconsistent verdicts. Any verdict against Unisys on CS's fraud claim will be directed at Unisys and therefore be separate and distinct from any arbitration award CS may obtain against Unisys's subsidiaries CV and World Trade in any future action for breach of contract. Even if CS were to bring a fraud action against CV or World Trade, any award in favor of CS against those subsidiaries would be distinct from any verdict CS obtained against the parent Unisys in this fraud action because of the separate identities of Unisys and CV and World Trade. See J. Moore, § 19.07-2[1], at 19-140-42 & n. 13 ("mere theoretical

possibilities" of inconsistent obligations are not enough for indispensability under Rule 19(b)).

Accordingly, we find neither CV not World Trade are necessary parties under Rule 19(a). Therefore, we need not reach subsection (b). Defendant's motion to dismiss for failure to join a necessary and indispensable party is denied.

Unisys next argues [*22] that this case must be dismissed for failure to state a claim upon which relief can be granted. Unisys's argument is twofold. First, Unisys contends that this action is barred by a clause located in a section of the 1994 Agreement headed "Termination of Original Agreements" which states: "the parties hereby waive any and all claims (whether notified to the other or not) which either of them may have arising out of the performance of or in connection with the Original Agreements or any such amendments thereto." Exhibit 4, P 2.2, p. 18. Unisys claims that "under the express terms of this waiver, all claims of fraudulent misrepresentation arising prior to March 1994 which allegedly induced CS to enter into the transactions out of which this dispute arises are waived." Defendant's Memorandum of Law at 29.

CS responds by arguing that this clause is unenforceable because the allegations in the Complaint contend that the 1994 Agreement which contains the clause was procured by fraud and that in any event the waiver clause only applies to claim brought by the parties to the 1994 Agreement against each other.[3]

[*23]

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3. While our standard of review under a Rule 12(b)(6) motion is normally limited to the allegations in the Complaint which we must accept as true, our Court of Appeals has held that "a court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on that document." *Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993)*. Here, there is no dispute as to the authenticity of the 1994 Agreement which Unisys includes in its Appendix as Exhibit 4. In addition, CS alleges in its Complaint that it entered into the 1994 Agreement as a result of misrepresentations made by Unisys. We, therefore, may consider the 1994 Agreement without converting the motion into one for summary judgment.

Since the gravamen of CS's complaint is that all of the contracts it entered into, including the 1994 Agreement, were procured by Unisys's alleged fraudulent misrepresentations, Unisys's argument must fail. In addition, the plain terms of the waiver clause bar only those claims that a party to the Agreement may have against the other party to the Agreement. ("the parties hereby waive any and all claims (whether notified to the other or not) . . .). Since it is undisputed that Unisys is not a party to the 1994 Agreement, the waiver clause does not bar CS's fraud claim against a third party such as Unisys.

Second, Unisys contends this action must be dismissed for failure to state a claim because a merger and integration clause contained in the 1994 Agreement precludes CS from claiming it justifiably relied, prior to 1994, on any alleged misrepresentations by Unisys. That clause provides that

this Agreement constitutes the entire Agreement and understanding between the Parties and supersedes all prior oral or written understandings, arrangements, representations or agreements between them relating to the subject matter of this Agreement. No director, employee or [*24] agent of either party is authorized to make any representation or warranty to the other party not contained in this Agreement and each party acknowledges that it has not relied on any such oral or written representations or warranties.

Exhibit 4, P 30.1, p. 48 (emphasis added). Unisys contends that "under Pennsylvania law, when the parties have agreed to a full integration clause that supersedes all prior representations, evidence of prior misrepresentations in support of a claim of fraudulent inducement is inadmissible under the parole evidence rule." Defendant's Memorandum of Law at 31.

Like the waiver clause mentioned above, the integration clause referenced by Unisys expressly applies only to the parties to the 1994 Agreement. Since it is undisputed that Unisys is not a party to that Agreement, the integration clause in that Agreement does not bar CS's fraud claim against Unisys.

Finally, Unisys contends this action must be dismissed on the ground of forum non conveniens because this forum is "distant from where the majority of relevant events occurred, the bulk of evidence is located, and the majority of witnesses reside." Defendant's Memorandum of Law at 32. [*25] Ironically, Unisys raises this argument despite the fact that it is being sued in a forum located approximately 30 miles from its corporate headquarters and the forum in which it wishes to proceed, Vienna, Austria, is located on another continent. See, *Lony v. E. I. Du Pont De Nemours & Co., 935 F.2d 604, 608 (3d Cir. 1991)* ("Lony II"). ("This case is puzzling in that frequently the forum non conveniens issue is raised by a defendant sued away from home who seeks to convince the court that the balance of relevant factors should be tipped against requiring it to defend far from its home jurisdiction... Here, in contrast, DuPont [the defendant], which is headquartered in Wilmington, Delaware and is the largest employer in that state, seeks to move the action against it to a forum more than 3000 miles away. It is, as Alice said, "curiouser and curiouser").

The doctrine of forum non conveniens permits a court to dismiss a case despite the existence of jurisdiction because of consideration for the interests of the litigants and in the interest of justice. See *Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507, 91 L. Ed. 1055, 67 S. Ct. 839 (1947)*. Under the doctrine, a district [*26] court may, in the exercise of its sound discretion, dismiss a case " 'when the alternative forum has jurisdiction to hear the case, and when the trial in the chosen forum would establish... oppressiveness and vexation to defendant... out of all proportion to plaintiff's convenience, or when the chosen forum is inappropriate because of considerations affecting the court's own administrative and legal problems.' " *Lacey v. Cessna Aircraft Co., 862 F.2d 38, 42 (3d Cir. 1988)* (Lacey I) (citations omitted). In deciding whether to dismiss a case under the doctrine of forum non conveniens, the ultimate inquiry is "where trial with best serve the convenience of the parties and the ends of justice." Id.

The defendant bears the burden of persuasion as to all elements of the forum non conveniens analysis. *Lacey v. Cessna Aircraft Co., 932 F.2d 170, 180 (3d Cir. 1991)* (Lacey II). First, the defendant must demonstrate that an adequate alternative forum exists as to all parties. Second, the defendant must show that the private and public interest factors[4] weigh heavily on the side of dismissal. Id.[5]

[*27]

The requirement of an adequate alternative forum is satisfied when: (a) the defendant is amenable to process in the other jurisdiction; and (b) the remedy available in the alternative forum is clearly satisfactory. Id. The alternative forum Unisys identifies in its papers is the "arbitration forum of Vienna". Memorandum of Law at 32. Unisys states that "there is no limitation on [CS] [*28] proceeding with its claim in an arbitration in Vienna according to UNCITRAL rules." Defendant's Reply Memorandum at 11-12. The trouble with this

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4. The private interest factors include: "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action," and other factors "that make trial of a case easy, expeditious and inexpensive." *Gulf Oil, 330 U.S. at 508.* The relevant public interest factors include the interest in having a trial of a diversity case in a forum that is home with the law that must govern, the local interests in having localized controversies decided at home and the administrative difficulties flowing from court congestion. *Id. at 508-509.* In addition, our Court of Appeals instructs that we must 'consider the locus of the alleged culpable conduct, often a disputed issue, and the connection of that conduct to plaintiff's chosen forum.' " *Lacey I, 862 F.2d at 48,* quoting *Van Cauwenberghe v. Biard, 486 U.S. 517, 528, 100 L. Ed. 2d 517, 108 S. Ct. 1945 (1988).*

5. When, as here, the case is brought by a foreigner, the district court must also consider the amount of deference that should be accorded to plaintiff's decision to bring suit in the United States. *Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, 1226 (3d Cir. 1995).* Although a foreign plaintiff's choice of forum is entitled to less deference, *Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981),* this is " 'not an invitation to accord a foreign plaintiff's selection of an American forum no deference since dismissal for forum non conveniens is the exception rather than the rule.' " *Lacey I, 862 F.2d at 45-46.* (citations omitted). (emphasis in original).

contention is that we have already found that CS's fraud claim against Unisys is not governed by the arbitration clause in the 1994 Agreement since Unisys was not a signatory to that Agreement. Therefore, despite Unisys's willingness to subject itself to process in Vienna, CS is not obligated to have its fraud claim decided by arbitration in Vienna and it is unlikely that an arbitration tribunal would even have jurisdiction over that claim. Accordingly, we find Unisys has not met its burden of showing that an adequate, alternative forum exists.

Even if Unisys had met its burden, the other considerations in the forum non conveniens analysis dictate against dismissing this action. Concerning the amount of deference due to the foreign plaintiff's decision to sue in Pennsylvania, we again note that CS is suing Unisys in Unisys's home forum where its corporate headquarters are located. Our Court of Appeals has stated that "[this] in itself has considerable weight in showing that the plaintiff's choice was based on convenience." *Lony v. [*29] E. I. Du Pont De Nemoirs & Co., 886 F.2d 628, 634 (3d Cir. 1989)* ("Lony I") on appeal aft. remand, *935 F.2d 604 (3d Cir. 1991)* ("Lony II"). See, Lony II, at 608.

Moreover, an analysis of the private and public interest factors reveals that CS's choice of this forum is entitled to heightened deference. Although the exact "locus of the alleged culpable conduct" is difficult to ascertain from the allegations in the Complaint, it does appear that an entire series of misrepresentations were made orally and in writing to CS's entire board of Directors by six of Unisys's representatives, including its Chairman and CEO, at Unisys's corporate headquarters in Blue Bell, Pennsylvania on January 12, 1994. Complaint at PP 24-31. Although many of Unisys's witnesses and documents will no doubt be located in Europe, many witnesses and documents will be located in Pennsylvania as well, including the top-level representatives who attended the meeting on January 12, 1994.[6]

[*30]

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6. At this early stage of the proceedings, it is unclear exactly where each of the witnesses and documents is located.

With regard to the public interest factors, this court has a current calendar and is, of course, inherently familiar with Pennsylvania law on fraud which will likely govern this case. Further, this forum in general and a local jury in particular certainly have an interest in adjudicating a dispute in which a major local corporation is accused by a foreign bank of engaging in deceptive acts. Finally, contrary to Unisys's assertions, it would seem that most of the documents upon which Unisys's alleged misrepresentations are based would be located at its corporate headquarters in Pennsylvania rather than in Europe. In short, trial of this case in defendant's home forum where a number of the acts in the Complaint are alleged to have taken place would not establish oppressiveness and vexation out of all proportion to CS's inconvenience. The motion to dismiss on forum non conveniens grounds is denied.

For all the foregoing reasons, the petition to compel arbitration is denied and the motion to dismiss is denied in all respects. We shall direct Unisys to file an Answer to the Complaint within 20 days of the date of this Order.

ORDER

The motion of the defendant to compel arbitration [*31] is DENIED.

The motion of the defendant to dismiss is DENIED.

Defendant shall file an Answer to the Complaint within 20 days of the date of this Opinion.

IT IS SO ORDERED.

CHARLES R. WEINER

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1944

CESKA SPORITELNA, a.s.,

vs.

UNISYS CORPORATION,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 96-04152)
District Judge: Honorable Charles R. Weiner

ARGUED May 9, 1997

BEFORE: STAPLETON, LEWIS, *Circuit Judges*
and WALLS,* *District Judge.*

JUDGMENT ORDER

After consideration of all contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court entered on October 10, 1996, be and is hereby **AFFIRMED,** essentially for the reasons set forth in the district court's opinion.

As to the appellant's renewed motion for a stay pending resolution of the appeal, it is **DENIED** as moot.

Costs taxed against the appellant.

BY THE COURT:

/s/ Walter K. Stapleton

Circuit Judge

Attest:

/s/ P. Douglas Sisk

Clerk

Date: May 28, 1997

*The Honorable William H. Walls, United States District Judge for the District of New Jersey, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1944

CESKA SPORITELNA, a.s.,

vs.

UNISYS CORPORATION,

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, *Circuit* Judges, and WALLS,* *District Judge.*

The petition for rehearing filed by appellant, Unisys Corporation, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Timothy K. Lewis
Circuit Judge

Date: JULY 7, 1997

*Honorable William H. Walls, United States District Judge for the District of New Jersey, sitting by designation, whose vote is limited to panel rehearing only.

CC: LPB, RLH, EJR, PJK, JBM

PETITIONER S RULE 29.6 STATEMENT

NON-WHOLLY OWNED SUBSIDIARIES OF PETITIONER UNISYS CORPORATION:

IDAT, Industria de Alta Tecnolgia, S.A.

Message e Informacao e Servicos S.A.

Procard S.A.

UNIMAC Computer Systems Ltd.

Beijing Beiyou Computer Systems C. Ltd.

Guangzhou YUNI Computer Software Co. Ltd.

Shanghai Baoni Corporation Systems Integration Company

Nihon Unisys, Ltd.

Economy Business Systems B.V.

Unisys Pakistan (Private) Limited

Unilot SzOO

Sperry Arabia Limited

Siam Unisys Ltd.

Unisys-Thai Holding Co. Ltd.

Unisys-Cyberware, Inc.

(2)

Supreme Court, U.S.
FILED
DEC 2 1997
CLERK

No. 97-594

In The

Supreme Court of the United States

October Term, 1997

UNISYS CORPORATION,

Petitioner,

vs.

CESKA SPORITELNA, a.s.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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2388

QUESTION PRESENTED

Whether a corporate defendant's petition to compel arbitration pursuant to the Federal Arbitration Act was properly denied where both parties admitted, and the district court found, that "there was no agreement between . . . [the parties] to submit this dispute to arbitration."

RULE 29.6 STATEMENT

Nonwholly owned subsidiaries of respondent Ceska Sporitelna, a.s. (companies in which the respondent owns less than 100% but more than 50% of the stock) are as follows:

CS-stavebni sporitelna, a.s.

SPF, a.s.

CS-Zivn. Pojistovna., a.s.

SINDAT CS Consulting, a.s.

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STATEMENT OF THE CASE

This Petition seeks review of a Pennsylvania district court's decision to deny a defendant's motion to compel arbitration where the defendant admitted, and the district court found, that the parties had no agreement to arbitrate. *See* Appendix to Petition at 10a ("Since . . . there was no agreement between CS and Unisys to submit this dispute to arbitration, the petition of Unisys to compel arbitration must be denied.") (district court opinion).

The Third Circuit affirmed the district court's decision in a judgment order which adopted the district court opinion, and both courts relied on this Court's recent decision in *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995), which held that:

> the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute . . . arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes — but only those disputes — that the parties have agreed to submit to arbitration.

514 U.S. at 943. *See* Appendix to Petition at 6a-7a, 10a, 19a (discussion of *First Options* in district court opinion).

Inexplicably, the Petition does not address or even cite *First Options*, even though both parties discussed the case at length in their briefs to the Third Circuit, and clearly recognized its applicability here. The Petition also fails to point out that the defendant had the opportunity to enter into an arbitration agreement with the plaintiff, and consciously chose not to do so. *Id.* at 10a ("if Unisys 'wanted to be able to invoke the arbitration . . . clause(s), (it) should have directed (BV) to include appropriate language in (those) agreements' ") (district court opinion).

Instead, the Petition misstates the facts of this case, and then argues, based almost exclusively on distinguishable cases that pre-date *First Options*, that the decision of the district court in the action below should be reexamined. This argument is not persuasive, and the Petition should be denied.

A. The Petition Wrongfully Imputes Improper Motive To The Plaintiff.

The Petitioner repeatedly describes the issue in this Petition as whether the plaintiff in the court below, Ceska Sporitelna, a.s. ("CS"), can "avoid" arbitration by suing the Petitioner for fraud. *See* Petition at i, 5, 9. There is no evidence in the record that CS is trying to "avoid" anything, however. In fact, in demanding arbitration when it never agreed to arbitrate, it is the Petitioner that is attempting to "avoid" the consequences of its own actions — through which it carefully insulated itself from any obligation to arbitrate with CS.

In this regard, it is undisputed that the Petitioner: (i) avoided entering into contracts with CS; (ii) maintained its position as an entity separate and apart from the various European affiliates that did enter into contracts with CS; and (iii) expressly required, when it issued a "guarantee" of one of those contracts, that any claims against it under that "guarantee" be decided in court in the U.K., not in arbitration. These facts reveal that until the evidence of its fraud was uncovered, and an appropriate action filed against it, the Petitioner had no interest whatever in participating in an arbitration with CS, and would not agree to do so.

On this point, footnote 1 on page 5 of the Petition is mistaken in suggesting that language in the Unisys "guarantee" did not influence the decision of the courts below, because at oral argument, the Third Circuit panel challenged Petitioner's counsel

by specifically referring to the point made in CS's brief that Unisys' intent *not* to arbitrate anything "was evidenced by the language in its English law guarantee" which "specifically stated that disputes as to Unisys' guarantee obligations would be resolved judicially, not in arbitration." This language, and the absence of any agreement to arbitrate between the parties, clearly was important to the decisions below.

The Petitioner also argues that "the selection of Unisys as a defendant was a tactical decision intended to avoid the contractual arbitration mechanism," Petition at 6, but again, there is no support for this claim. Moreover, it wrongly presumes that there is no basis for an independent fraud claim against Unisys. In fact, the evidence of such fraud is overwhelming, and as the district court recognized, the fraud in question was committed by Unisys, not its "European affiliates":

> it does appear that an entire series of misrepresentations were made orally and in writing to CS's entire board of Directors by six of Unisys' representatives, including its Chairman and CEO, at Unisys' corporate headquarters in Blue Bell, Pennsylvania on January 12, 1994.

Appendix to Petition at 17a (district court opinion). Under these circumstances, the Petition's attempt to impute improper motive to the plaintiff CS is ill-founded.

B. The Petition Repeatedly Makes Factual Assertions That Are Not Supported By The Record And Are Disputed In The Proceeding Below.

The facts of this case are not correctly stated in the Petition, and many important facts are omitted from the Petition.

First, the action below against Unisys is not merely "for alleged misrepresentations regarding its subsidiary's ability to deliver the computer system," as the Petition states at page 5. Rather, it is for a series of independent fraudulent acts which included: (i) misrepresenting in writing the characteristics of a specific retail banking system; (ii) misleading CS into making an early determination to select that system as the one most suitable for its use; (iii) persuading CS not to terminate its efforts to install that system when the inherent problems with it began to appear; and (iv) fraudulently concealing those problems, which were known to Unisys, throughout its dealings with CS — which extended over almost four years.

Second, the Petition is inaccurate in claiming, at page 6, that

> [t]he fraud claim against Unisys is distinguished from a breach of contract claim against BV solely by the identity of the defendant, and the allegation that the alleged inability to perform was known to Unisys prior to the execution of the relevant contracts.

In fact, the fraud claim against Unisys is completely independent of any contract claim against BV, and it deals with sharply distiguishable issues. The district court recognized this fact in its opinion. *See* Appendix to Petition at 12a ("[a]ny verdict against Unisys on CS's fraud claim will be separate and distinct from any arbitration award CS may obtain against Unisys' subsidiaries").

Third, the claim in the Petition that CS entered into two contracts with a European affiliate of Unisys, and that "[i]n both agreements, CS agreed to arbitration as the mechanism for resolving disputes arising out of its purchase of the computer system," Petition at 5, is inaccurate and misleading. In fact,

during the period 1991-1995, CS entered into five (5) different contracts with two (2) different European affiliates of Unisys in connection with its procurement of what Unisys had represented to it as a proven and tested retail banking system. Only three (3) of those contracts (including the two identified in the Petition) contained arbitration clauses, and each clause was substantively narrow, procedurally specific, and strictly limited to particular types of disputes between CS and the European parties. The Petitioner was not a party to any of those contracts.

Fourth, the suggestion at page 5 of the Petition that "system design changes . . . requested by CS" prompted the execution of a new contract in 1994 is inaccurate, as is the claim that "[t]wo mainframe computers worth approximately $70 million, were delivered to CS early in the project and are still in use today." In fact, the 1994 contract was prompted by failures in the Unisys retail banking system, and the mainframe computers from Unisys had little if any value because the software that was supposed to enable them to operate a fully integrated retail banking system did not work. Similarly, the claim that "a significant portion of the software deliveries under the contract were made, and are still in use at the bank today," Petition at 5, is inaccurate. The most critical software deliveries were never made, and the defect-ridden software that was delivered initially had to be significantly modified to function at all.

Finally, the claim at page 6 of the Petition that "many of the alleged misrepresentations in the Complaint were made by employees and officials of Unisys subsidiaries other than the parent Unisys" is inaccurate and disputed in the proceeding below. In fact, most of the misrepresentations by Unisys that are alleged were made in writing in documents that clearly identified Unisys Corporation as the speaker. Thus, it is not the case, as the Petition claims at page 6, that "[t]he alleged misrepresentations amount to little more than alleged oral

statements of the representations made by BV in the contract." In fact, most of the Petitioner's misrepresentations were in writing, and many of them pre-date any contract between CS and the Unisys affiliate BV.

C. The Petition Mischaracterizes the District Court's Holding.

The Petitioner claims that the district court rejected its argument based purely on an interpretation of the Third Circuit's decision in *Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d 1287 (3d Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 583 (1996), and the Petition selectively quotes from the district court's discussion of *Dayhoff* to support this claim. *See* Petition at 7.

In fact, however, the district court also relied directly on this Court's decision in *First Options of Chicago v. Kaplan*, *supra*, and the fact that as a matter of law, the Federal Arbitration Act upholds a *contract* theory of arbitration, not a "relatedness" or "involvement" theory, and in order for one party to compel another to arbitrate, those two parties must have an agreement to arbitrate. Here, the district court found that there was none.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS ALREADY ANSWERED THE QUESTION PRESENTED IN THIS CASE, AND THE THIRD CIRCUIT'S DECISION WAS PERFECTLY CONSISTENT WITH THAT ANSWER.

This Court has already answered the question presented in this case in *First Options of Chicago v. Kaplan*, 514 U.S. 938, 943 (1995), where the Court held that "[t]he arbitrability of the merits of a dispute depends on whether the parties agreed to arbitrate that dispute . . . arbitration is simply a matter of contract between the parties." *See also McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co.*, 858 F.2d 825, 831 (2d Cir. 1988) ("[t]he purpose of the Federal Arbitration Act was to make arbitration agreements as enforceable as other contracts, *but not more so*") (emphasis in original).

In the proceeding below, the district court concluded that Unisys and CS had no agreement to arbitrate, and that there was "no principal/agent relationship" entitling Unisys to be treated as a party to the arbitration clauses that appeared in two English law contracts entered into between CS and a European affiliate of Unisys. *See* Appendix to Petition at 9a (district court opinion). Based on these conclusions of fact and law, the district court denied the Petitioner's motion to compel arbitration, citing this Court's decision in *First Options v. Kaplan*, *supra*, and the Third Circuit's previous holding in *Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d 1287 (3d Cir. 1996) ("The opinions in *Kaplan* are the controlling precedent").

The Third Circuit affirmed in a brief judgment order, in which it adopted the district court's findings, because this case

involved a straightforward application of *First Options*. Although the Petition claims, at pages 14-15, that the Third Circuit should have applied what the Petitioner calls "the non-signatory doctrine articulated in *Pritzker* [*v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110 (3d Cir. 1993)]," the author of the opinion in *Pritzker*, Third Circuit Judge Timothy K. Lewis, did not agree. This is clear because he joined in the issuance of the judgment order in this case, and specifically discussed this Court's decision in *First Options* during oral argument.

Inexplicably, the Petition does not address or even cite *First Options*, even though the Petitioner's brief to the Third Circuit discussed the case at length, and clearly recognized its applicability here. Instead, the Petition relies almost exclusively on cases that predate *First Options*, and are distinguishable from this case on their facts.

II.

THE COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH OPINIONS IN OTHER CIRCUITS.

The Petition argues that the Third Circuit's decision is somehow "in conflict" with the opinions in other circuits, but the cases it cites do not support this claim, and many are sharply distinguishable on their facts.

In *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773 (2d Cir. 1995) (cited on page 10 of the Petition), for example, the Second Circuit refused to allow one party to an arbitration agreement to compel the nonsignatory parent of the other party to arbitrate, finding that on the facts presented, the nonsignatory parent "could not possibly be bound under an agency theory." *Id.* at 777. This is similar to what the district court found in this case, and certainly is not contrary to the Third Circuit's decision.

Similarly, in *Britton v. Co-Op Banking Group*, 4 F.3d 742 (9th Cir. 1993) (cited at pages 10-11 of the Petition), the Ninth Circuit refused to allow the nonsignatory purchaser of a company to enforce an arbitration clause contained in a contract previously entered into by that company with a third party, noting that:

> [t]he right to compel arbitration *stems from a contractual right* . . . That contractual right may not be invoked by one who is not a party to the agreement and does not otherwise possess the right to compel arbitration.

Britton, 4 F.3d at 744 (emphasis added). *See also McCarthy v. Azure*, 22 F.3d 351 (1st Cir. 1994) (cited at page 10 of the Petition) (affirming denial of a motion to compel arbitration, and noting that "a party seeking to substitute an arbitral forum must show . . . that the protagonists have agreed to arbitrate").

Other cases cited in the Petition are simply inapplicable here, because they involve completely different facts. In *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753 (11th Cir. 1993), *reh'g, en banc, denied, cert. denied sub nom Sunkist Growers v. Del Monte Corp.*, 513 U.S. 869 (1994) (cited throughout at pages 10-15 of the Petition), for example, the nonsignatory that the court held was entitled to invoke the arbitration clause was a successor-in-interest to the party that had signed the arbitration agreement, having purchased that company, absorbed its operations, and directly inherited its rights and obligations:

> Upon acquiring ownership of SSD, Del Monte ceased operating it as an independent enterprise and absorbed it into Del Monte's own internal soft drink division. *For all practical purposes, SSD lost its independent operating status and became a part of Del Monte.*

Id. at 758 (emphasis added). This was clearly not the situation in this case. Moreover, attempts to stretch *Sunkist* beyond its facts, even in the Eleventh Circuit where it was decided, have proven unavailing, as recent discussion of *Sunkist* by an Eleventh Circuit district court makes clear:

> Persuasive authority . . . supports the conclusion that a district court is not required to compel arbitration between parties who have not agreed to such arbitration. . . .
>
> The holding in *Sunkist* does not require a contrary conclusion. As plaintiffs point out, the *Sunkist* court emphasized that upon acquiring Sunkist Soft Drinks, Inc. ("SSD") from Sunkist Growers, Inc., *the Del Monte Corporation absorbed SSD's operations* into Del Monte's own soft drink division *and effectively succeeded to SSD's express contractual right to arbitrate any disputes against it.*

Collins v. International Dairy Queen, Inc., 169 F.R.D. 690, 693 (M.D. Ga. 1997) (emphasis added). In this case, there was no suggestion that Unisys had ever "absorbed", or "succeeded to the rights of", the European entities whose arbitration clauses it sought to invoke. For this reason, *Sunkist* is not applicable here.

Similarly, the Petition cites, at pages 10-12, 15, the nine-year old pre-*First Options* decision in *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988). In *J.J. Ryan*, however, the plaintiff had sued a parent corporation and its subsidiaries after the parent threatened to terminate certain contracts, containing arbitration clauses, that the plaintiff had entered into with the subsidiaries. 863 F.2d at 318. In this case, by contrast, the claims against Unisys allege independent acts of fraud, regardless of whether any affiliate of Unisys

breached an agreement. Thus, *J.J. Ryan* would not be applicable here even if it had been decided after *First Options*.

Among other non-controlling cases, the Petition (at pages 10, 12) cites *In re Oil Spill by the "Amoco Cadiz"*, 659 F.2d 789 (7th Cir. 1981). *Amoco Cadiz* is completely distinguishable from this case, however, because there, the plaintiff/nonsignatory (who was trying to avoid arbitration) was taking inconsistent positions in the litigation on the issue of *its* agency relationship to the signatory:

> *By its own allegations*, [the nonsignatory's] stake in the controversy is as [the signatory's] agent. *Having alleged an agency relationship as a basis for its standing in the suit*, it cannot slough off that relationship at will. It would advance neither judicial economy nor the purposes of the federal arbitration act to permit [the nonsignatory] to assert in a judicial forum claims grounded upon its alleged relationship to [the signatory] and to allow it to disavow the relationship for purposes of the arbitration . . .

659 F.2d at 796 (emphasis added). In this case, by contrast, CS has not alleged that it is an "agent" of anyone that has an arbitration agreement with Unisys. *Amoco Cadiz* is thus irrelevant to this case.

Other cases cited by Unisys also differ markedly on their facts from the instant case. *See Arnold v. Arnold Corp.*, 920 F.2d 1269 (6th Cir. 1990) (officers and directors of corporation that signed arbitration clause could compel arbitration in their capacity as agents of corporation); *Goodwin v. Ford Motor Credit Co.*, 970 F. Supp. 1007 (M.D. Ala. 1997) (nonsignatory party seeking to enforce arbitration clause was assignee of all signatory's rights under the contract containing the arbitration

clause); *Gulf Guaranty Life Ins. Co. v. Connecticut Gen. Life Ins. Co.*, 957 F. Supp. 839 (S.D. Miss. 1997) (plaintiff specifically alleged agency relationship between signatory and nonsignatory corporate affiliates); *Chase v. Check*, 158 F.R.D. 59 (E.D. Pa. 1994) (defendants were all signatories or agents of signatories). Thus, they provide no evidence of a "conflict" between the circuits on this issue.

III.

THE "EXTENSION" RULE ADVOCATED IN THE PETITION WOULD CREATE CHAOS IN ALL CASES WHERE ARBITRABILITY IS CONTESTED, AND IT WOULD NOT BE FAIR.

The Petition advocates the "extension" of arbitration agreements beyond the parties to those agreements, based on the alleged "involvement" of non-parties in the transactions at issue. Such a rule, however, would create a procedural nightmare in the district courts, which would have to determine, in each case where a non-party sought to compel arbitration, whether that non-party was sufficiently involved in the transactions at issue to justify "extending" the other parties' arbitration agreement to it.

Such an approach would also be fundamentally inconsistent with the intent of Congress in enacting the Federal Arbitration Act, which was to "make arbitration agreements as enforceable as other contracts, *but not more so*." *McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co.*, 858 F.2d 825, 831 (2d Cir. 1988) (emphasis in original). It would also run directly contrary to this Court's holding in *First Options* that "the arbitrability of the merits of a dispute depends on whether the parties agreed to arbitrate that dispute . . . arbitration is simply a matter of contract between the parties." 514 U.S. at 943.

The "extension" rule advocated in the Petition would also be extremely unfair, because it would allow parties to compel arbitration where they themselves had never agreed to arbitrate. This would violate the basic contract principle of "mutuality of obligation," which is at the heart of contract formation. The Third Circuit recognized this problem in *Dayhoff*, *supra*, where, in determining that the defendant Hershey could not compel arbitration based on agreements to which it was not a party, the court of appeals explained:

> Of course we recognize that [plaintiff] Dayhoff did agree to the arbitration . . . clause. However, we find appellee's [defendant Hershey's] position [that it should be able to compel arbitration of claims against it based on agreements to which it was not a party] unacceptable, in that under it Hershey (as well as other nonsignatories to the agreement) has the option to accept or reject the arbitration . . . clauses, whereas Dayhoff . . . is compelled to accede to Hershey's wishes. *The very fact that Hershey would have such a choice belies the existence of an agreement [to arbitrate] between Dayhoff and Hershey.*

Dayhoff, 86 F.2d at 1294, 1296-97 (emphasis added). The same situation is presented here.

In this case, the Petitioner clearly had the right to avoid arbitration at any time simply by pointing out that: (1) its European affiliate BV is organized as a separate company that it does not own directly (which is apparently true); (2) it was *not* a party to any of BV's contracts with the plaintiff (which is true); (3) it never agreed to arbitrate anything with CS (which is true); and (4) its intent *not* to arbitrate anything was evidenced by the language in its English law guarantee of one of BV's contracts with CS, which specifically stated that disputes as to

its guarantee obligations would be resolved *judicially*, not in arbitration.

Despite being insulated in this way from any obligation to arbitrate, the Petitioner argues that it should nevertheless be allowed to compel arbitration of the claims asserted against it in the district court now simply because it wishes to do so. A party cannot "have it both ways," however — *i.e.*, refuse to agree to arbitration itself, and yet still reserve the right to "become involved" in the transactions in issue, and thereafter compel arbitration of any claims against it arising out of those transactions by invoking the arbitration agreements of other parties. This would not be fair, and it certainly would not enhance the "certainty" of dispute resolution mechanisms — because no one would ever be able to predict who the parties to an arbitration might be.

IV.

THE THIRD CIRCUIT'S DECISION DOES NOT IN ANY WAY "UNDERMINE PREDICTABILITY IN INTERNATIONAL BUSINESS TRANSACTIONS".

The Petitioner argues that this Court should extend to corporate parents the arbitration provisions in their subsidiaries' contracts with third parties in order to add "predictability" to the forum selection process, and as a prophylactic measure against what it characterizes as "the 'end around' the arbitration clause effected by CS here." Petition at 18. What this argument ignores, however, is that in this case, the Petitioner took its own steps to ensure "predictability" by carefully insulating itself from any obligation to arbitrate with CS.

First, Unisys avoided becoming a party to *any* of the European contracts that CS entered into with the European

companies that were working on the CS project. Second, when it issued a guarantee of one of those contracts, it carefully avoided agreeing to arbitrate *any* disputes with CS, and expressly provided that any disputes with CS as to its guarantee obligations under the governing English law would be decided in *court*. Third, it did not enter into any agreements with CS as to how or where any other claims against it would be adjudicated. Fourth, it carefully maintained its position as an entity separate and apart from the European companies with which CS contracted — even admitting, in its brief on this appeal, that CS's action in the court below is "against an entity with which it did not contract." Petition at 9.

Having carefully distinguished itself in this manner from the European entities with which CS contracted, the Petitioner should not now be able to insist that it be governed by the terms of their contracts, particularly where it could have successfully resisted any such demand if CS had made it. Unisys chose to insulate itself from any contractual obligation to arbitrate with CS. It cannot now demand that this Court reverse the effect of that decision in order to enhance "competitive business practice," or to reduce what it claims will otherwise be a "chill" in "international business relationships." *Id.* at 18-19.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

UNISYS CORPORATION,

Petitioner

v.

CESKA SPORITELNA, A.S.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF FORD MOTOR COMPANY, EASTMAN KODAK COMPANY, AND SHELL OIL COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

UNISYS CORPORATION,

Petitioner

v.

CESKA SPORITELNA, A.S.,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

MOTION OF FORD MOTOR COMPANY, EASTMAN KODAK COMPANY AND SHELL OIL COMPANY FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, Ford Motor Company, Eastman Kodak Company and Shell Oil Company move for leave to file the accompanying brief as *amici curiae* in support of the petition for writ of certiorari.[1] All three corporations do business internationally, often acting through corporate subsidiaries and affiliates in order to comply with local laws of foreign countries, and to maximize the legal, regulatory, tax and business consequences of transactions subject to the laws of more than one country. All three corporations frequently employ binding arbitration as the

1. As required by Supreme Court Rule 37.6, *amici curiae* on this brief inform the Court that this brief was authored in substantial part by counsel for Unisys Corporation, defendant and petitioner in this matter. However, counsel for the three corporations participating as *amici* in support of Unisys' petition have all reviewed and provided input on this submission, and affirm that its contents represent their position on the issue of the arbitrability of claims against non-signatory corporate affiliates. Unisys Corporation made monetary contributions to the preparation and submission of this brief.

method for resolving disputes in international transactions, in order to avoid the uncertainty of being subject to the jurisdiction of multiple fora.

The decision of the Third Circuit to deny arbitration to non-signatory corporate parents of contract parties is in conflict with the doctrine developed in most other courts of appeals in the federal system. Each of the three corporations participating as *amici* have principal places of business in different states, and will likely be subject to jurisdiction in different circuits. If the Third Circuit's exception to the non-signatory doctrine adhered to by other courts of appeals remains good law then the enforceability of arbitration agreements entered into by corporate subsidiaries in *international* transactions will hinge on inconsistencies in *national* law. Corporations participating in international commerce need definitive resolution of the question presented by Petitioner in order to gauge the dependability of contracted for dispute resolution mechanisms, which this Court has treated as integral to international transactions.

Petitioner Unisys Corporation has consented to the filing of this brief. Ceska Sporitelna, a.s., respondent to this petition, and plaintiff below, refused consent. Therefore, Ford Motor Company, Eastman Kodak Company and Shell Oil Company request leave to file the accompanying brief as *amici curiae.*

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

UNISYS CORPORATION,

Petitioner

v.

CESKA SPORITELNA, A.S.,

Respondent

BRIEF *AMICI CURIAE* OF FORD MOTOR COMPANY, EASTMAN KODAK COMPANY, AND SHELL OIL COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

DESCRIPTION AND INTEREST OF *AMICI CURIAE*

The corporations participating as *amici curiae* in support of the petition of Unisys Corporation are all multinational enterprises which do business through subsidiaries in foreign countries. Ford Motor Company ("Ford") is incorporated in Delaware, with a principal place of business in Dearborn, Michigan. Ford manufactures, distributes and sells vehicles throughout the world, typically acting through wholly owned subsidiaries. In addition, Ford has equity interests in two foreign automobile manufacturers, Mazda Motor Corporation and Kia Motors Corporation. Ford is also one of the largest providers of financial services worldwide through corporate affiliate Ford Credit and related businesses, and owns one of the world's largest rental vehicle companies, Hertz Corporation.

Eastman Kodak Company ("Kodak") is incorporated in New Jersey, with a principal place of business in Rochester, New York. Kodak also manufactures, distributes and sells its

products worldwide, typically acting through wholly owned subsidiaries. Kodak operates more than 100 subsidiaries in more than forty countries in Europe, Africa, Asia, and North and South America.

Shell Oil Company ("Shell") is an indirectly, wholly owned subsidiary of two foreign holding companies, Royal Dutch Petroleum Company, incorporated in the Netherlands, and Shell Transport and Trading Company PLC, incorporated in England. Shell is incorporated in Delaware, with a principal place of business in Houston, Texas. Shell is a direct or indirect owner of numerous subsidiary companies engaged in international commerce relative to the exploration and development of oil and gas resources, and marketing of petrochemicals.

All companies participating in this brief *amici curiae* have an interest in ensuring the sanctity of arbitration agreements freely entered into by companies engaging in international commerce, and the consistent enforcement of such agreements in the federal courts of appeals. Subsidiaries of Ford, Kodak and Shell frequently enter into international transactions, an important condition of which is often a non-judicial dispute resolution mechanism that prospectively establishes the forum and the law to be applied. The rule established by the Third Circuit, that non-signatory parent corporations can never benefit from the arbitration agreements that their subsidiaries enter into, will, as a practical matter, render arbitration agreements meaningless because the litigant which seeks to avoid such terms will always be able to locate a non-signatory corporate presence against whom to plead its claim. Accordingly, *amici* submit this brief in support of the petition for certiorari in order to protect and further their interest in ensuring the sanctity of prospectively crafted dispute resolution mechanisms.

SUMMARY OF ARGUMENT

Unisys Corporation ("Unisys") is litigating in federal court a dispute arising out of a computer project that was sold under an agreement requiring all disputes to be resolved through arbitration. The lawsuit has remained in federal court because the claims, which would certainly be considered arbitrable if pleaded against the Unisys subsidiary which signed

the agreement, were pleaded against a Unisys entity – the parent company, Unisys – with which the plaintiff Ceska Sporitelna, a.s. ("CS") did not contract. Both the district court and the court of appeals have taken a very formalistic approach that limits application of the arbitration clause, intended for all disputes arising out of the project, to only disputes pleaded against the contract parties.

This Court has recognized in numerous decisions how important it is for corporations doing business in international markets to be able to prospectively arrange where disputes arising out of their transactions will be decided. If, as occurred in the Unisys-CS case, a party which has agreed to arbitrate disputes arising out of a project can escape that commitment simply by alleging misconduct against an entity affiliated with the contract party, then the contractual commitment to arbitrate will be swallowed by the loopholes through it.

The personnel and resources of multinational corporations are sufficiently fluid that it will almost always be the case that multiple entities in the corporate structure will contribute to or oversee the projects formally entered into by one corporate entity; indeed, that circumstance is generally beneficial to the party receiving services from the multinational. Any legal rule requiring deference to a contractual commitment to arbitration must be developed consistent with the business reality that multinational corporations, while operating through distinct legal entities, overlap the functions of the various entities in support of their products and services.

The majority of federal circuits have developed a practical rule for enforcing arbitration agreements when parties that have entered into such agreements attempt to avoid their commitment by pleading against a non-signatory affiliate. Where the claims against the non-signatory, whether cast as contract or tort claims, arise out of, or are intertwined with, the contract containing the arbitration clause, courts have extended the arbitration clause to the non-signatory affiliate, in express recognition of the fact that the arbitration clauses will otherwise easily be rendered meaningless.

The Third Circuit has taken the position in the Unisys-CS case that this widely followed practical doctrine has no appli-

cation where the non-signatory seeking to benefit from the arbitration clause is the parent corporation of the signatory. This position is inconsistent with cases in other Circuits, and is an illogical limitation on the extension of arbitration clauses to non-signatories — a rule that the Third Circuit adheres to in at least some circumstances. It is crucial that this Court establish a uniform rule for application of the non-signatory doctrine so that businesses are not subject to inconsistent treatment of dispute resolution agreements depending on the location in which they are incorporated and doing business.

In making that determination, the Court must be sensitive to the fact that in the absence of a non-signatory doctrine, there is no practical arrangement for business transactions that could be instituted by corporate entities operating in the international market that would insure the application of dispute resolution mechanisms against clever pleading. If arbitration clauses are to have meaningful effect in international commerce, where this Court has given them greatest deference, this Court must grant Unisys' petition for certiorari and reverse the Third Circuit's narrow and formalistic reading of the parties commitment to arbitrate.

STATEMENT OF THE CASE

Amici adopt the statement of the case as set forth in the petition for certiorari.

ARGUMENT

I. CORPORATIONS MUST BE ABLE TO DETERMINE PROSPECTIVELY THE FORUM FOR DISPUTES ARISING OUT OF INTERNATIONAL BUSINESS TRANSACTIONS

The Federal Arbitration Act, 9 U.S.C. § 1, *et. seq.*, is "a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The "federal policy [in favor of arbitral dispute resolution] applies with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

The reason that the Court places special emphasis on arbitration clauses in the international context is that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Mitsubishi Motors Corp.*, 473 U.S. at 631 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974)). Prospective determination of how disputes are to be adjudicated is particularly important "[i]n the context of international contracts [because] the opportunities for increasing the cost, time and complexity of resolving disputes are magnified by the presence of multiple possible fora, each with its own different substantive rules, procedural schematas, and legal cultures." *Menorah Ins. Co. v. INX Reinsurance Corp.*, 72 F.3d 218, 223 (1st Cir. 1995); *see also Scherk*, 417 U.S. at 517 ("[T]he dicey atmosphere of such a legal no-man's land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of business to enter into international commercial agreements."); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 11-13 (1972)("Not surprisingly, foreign businessmen prefer, as do we, to have disputes resolved in their own courts, but if that choice is not available, then in a neutral forum with expertise in the subject matter."); *David L. Threlkeld & Co. v. Metallgesellschaft, Ltd.*, 923 F.2d 245, 248 (2d Cir. 1991)("Enforcement of international arbitral agreements promotes the smooth flow of international transactions by removing the threats and uncertainty of time-consuming and expensive litigation. The parties may agree in advance as to how their disputes will be expeditiously and inexpensively resolved should their business relationship sour."); Steven C. Nelson, *Alternatives to Litigation of International Disputes*, 23 Int'l Lawyer 187, 188 (1989)("Forum shopping, a concern in the U.S. domestic context, offers entirely new possibilities for manipulation of a dispute in the international context.")

II. THE NON-SIGNATORY DOCTRINE DEVELOPED IN OTHER CIRCUITS IS NECESSARY TO PROTECT ARBITRATION AGREEMENTS AGAINST CLEVER PLEADING

United States corporations often engage in international transactions through the use of a foreign subsidiary. Where that is the case, the non-signatory entities in the corporate structure will be vulnerable to litigation regarding the transaction — either because they did participate in the transaction, or because they can simply be alleged to have done so. In anticipation of either scenario, corporations will want to insure that claims pleaded against all members of the corporation be directed to the forum identified in the contract's dispute resolution clause. Otherwise entities entering into foreign transactions would expose themselves to the uncertainty of legal fora and foreign laws and procedure, which, as this Court has stated, is exactly what dispute resolution clauses are designed to avoid.

In recognition of the fact that corporations entering into transactions through subsidiaries do seek to prospectively control where disputes arising out of those transactions will be adjudicated, even where it is contemplated that non-signatory corporate members will participate in the transaction, most courts confronted with a lawsuit arising out of or intertwined with a contract containing an arbitration clause have applied the arbitration clause to the benefit of non-signatories. *Sunkist Soft Drinks v. Sunkist Growers,* 10 F.3d 753 (11th Cir. 1993), *cert. denied,* 513 U.S. 869 (1994); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells,* 9 F.3d 1060 (2d Cir. 1993); *Arnold v. Arnold Corp.-Printed Communs. for Bus.,* 920 F.2d 1269 (6th Cir. 1990); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.,* 863 F.2d 315 (4th Cir. 1988); *McBro Planning and Dev. Co. v. Triangle Elec. Constr. Co.,* 741 F.2d 342 (11th Cir. 1984); *In re Oil Spill By the "Amoco Cadiz", etc.* 659 F.2d 789 (7th Cir. 1981); *Hughes Masonry Co. v. Greater Clark Cty. School Bldg. Corp.,* 659 F.2d 836 (7th Cir. 1981); *Sam Reisfeld & Son Import Co. v. S.A. Eteco,* 530 F.2d 679 (5th Cir. 1976). This doctrine has also been recognized in dicta in decisions where the claims were not sufficiently intertwined with the contract

containing the arbitration clause to warrant extending the arbitration clause to the non-signatories. *See, e.g., Thomson-CSF, S.A. v. American Arbitration Ass'n,* 64 F.3d 773 (2d Cir. 1995); *Britton v. Co-Op Banking Group,* 4 F.3d 742 (9th Cir. 1993).

Courts that have employed the non-signatory rule have recognized that it is a necessary safeguard against tactical pleading around arbitration clauses, converting breach of contract suits against contract parties into fraud claims against affiliated non-signatories. *See, e.g., "Amoco Cadiz",* 659 F.2d at 796; *McBro Planning,* 741 F.2d at 343-44 ("[I]t is well established that a party may not avoid broad language in an arbitration clause by attempting to cast its complaint in tort rather than contract."); *Sam Reisfeld & Son Import Co.,* 530 F.2d at 681 ("If the parent corporation was forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted."); *Chase v. Check,* 158 F.R.D. 59, 63 (E.D. Pa. 1994)("[The] [non-signatory] rule . . . makes sense because if plaintiffs can avoid the practical consequences of an agreement to arbitrate by naming non-signatory parties as defendants . . . the effect of the rule requiring arbitration would, in effect, be nullified.'"); *Vitzethum v. Dominick & Dominick, Inc.,* Nos. 94 Civ. 4938, 95 Civ. 429, 1996 WL 19062, * 7 (S.D.N.Y. Jan. 18, 1996) ("Plaintiffs cannot escape enforcement of the arbitration agreement simply by suing the parent [non-signatory] rather than [the subsidiary non-signatory]."); *see also* Scott M. McKinnis, *Enforcing Arbitration With A Nonsignatory: Equitable Estoppel And Defensive Piercing Of The Corporate Veil,* 1995 J. Disp. Resol. 197, 211 (1995)("[A] corporation will not be allowed to avoid the effects of an arbitration clause based on the non-signatory status of defendants while simultaneously asserting claims against the non-signatory party arising from the same contract."); *cf. Lu v. Dryclean-USA of California, Inc.,* 14 Cal. Rptr. 2d 906, 908 (Ct. App. 1992)("To hold [that the fact that the non-signatories did not sign the Agreement renders the forum selection clause unenforceable] would be to permit a plaintiff

to sidestep a valid forum selection clause simply by naming a closely related party who did not sign the clause as a defendant.")

III. THE THIRD CIRCUIT'S APPLICATION OF THE NON-SIGNATORY DOCTRINE IS INCONSISTENT WITH OTHER CIRCUITS AND CREATES UNCERTAINTY FOR CORPORATIONS DOING BUSINESS IN INTERNATIONAL COMMERCE

Until recently, the Third Circuit appeared to be in step with the other circuits in terms of taking a practical approach towards applying arbitration clauses to non-signatories where the claim against the non-signatory was intimately related to the contract containing the arbitration clause. In *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith,* 7 F.3d 1110 (3d Cir. 1993), the court held that an arbitration clause in an asset management contracts applied to a non-signatory corporate affiliate of the contract party that had provided services in support of the contracts. *Id.* at 1122. The court, applying "agency logic" to the facts before it, held that "[w]here the parties to [an arbitration clause] unmistakably intend to arbitrate all controversies which might arise between them, their agreement should be applied to claims against agents or entities related to the signatories." *Id.* Had this reasoning been applied to the Unisys-CS case, the federal suit would certainly have been dismissed in favor of arbitration.

Between the time that *Pritzker* was issued and the disposition of Unisys' motion and appeal, the Third Circuit decided *Dayhoff, Inc. v. H.J. Heinz Co.,* 86 F.3d 1287 (3d Cir.), *cert. denied,* — U.S. —, 117 S. Ct. 583 (1996). In *Dayhoff,* the plaintiff stated various contract and tort claims arising out of the termination of a candy distribution contract by a subsidiary of the Heinz Company prior to the sale of assets by Heinz to Hershey Foods. The court held that the arbitration clause bound only the single Heinz subsidiary that had contracted with the plaintiff, and that subsidiary's successors in interest, but not other defendants sued by the plaintiff.

Defendants from the Heinz Corporation (which had owned the signatory defendant during the time that the parties negotiated, performed, and terminated the contract) and

defendants from Hershey (which had no involvement with contract negotiation or performance) argued that the arbitration clause should be extended to claims against them. 86 F.3d at 1295-96. Both the parties and the court focused their attention on the Hershey defendants. *Id.*, n.7. The decision not to extend the arbitration clause to those defendants fits cleanly within the prevailing application of the non-signatory rule, as the conduct alleged was subsequent and external to the contracts containing the arbitration clause. *See, e.g., Thomson-CSF, S.A.*, 64 F.3d at 777 (declining to apply non-signatory rule because claim that parent purchased signatory subsidiary in order to eliminate plaintiff which had exclusive agreement to supply equipment with subsidiary "can hardly be characterized as arising out of or being integrally related to the . . . Agreement"); *Britton*, 4 F.3d at 748 (declining to apply non-signatory rule because "acts [alleged] are subsequent, independent acts of fraud, unrelated to any provision or interpretation of the contract").

The Third Circuit's treatment of the Heinz non-signatory defendants is, respectfully, too brief and opaque to draw any conclusions regarding whether the conduct alleged was sufficiently intertwined with the contract to warrant application of the non-signatory rule developed in other decisions. Regarding the Heinz defendants, the court wrote only that:

> We also point out that Heinz Italia and H.J. Heinz should not by reason of their corporate relationship with Heinz Dolciaria be able to invoke the arbitration and forum selection clauses, for there is no more reason to disregard the corporate structure with respect to such claims as there would be to disregard it with respect to other legal matters.

Dayhoff, 86 F.3d at 1297.

From this language the district court in this case, and the circuit court by incorporation, extracted the principle that the non-signatory doctrine should never be applied to extend an arbitration clause in a contract signed by a corporate subsidiary to a non-signatory parent corporation. *Ceska Sporitelna, a.s. v. Unisys Corp.*, C.A. No. 96-4152, 1996 U.S. Dist. LEXIS 15435, *17, (E.D. Pa. Oct. 10, 1996) ("Our reading of *Dayhoff*

convinces us that the decision did not turn on the amount of involvement [the non-signatories] had with the License Agreement containing the arbitration clause but solely on the corporate relationship between [non-signatories and signatories] which the Court refused to disregard."), *aff'd without opinion*, 116 F.3d 467 (3d Cir. 1997).

If this Court agrees that arbitration clauses are appropriately extended to non-signatories in order to protect such dispute resolution agreements against clever pleading, a proposition that has been accepted in some form by virtually every court that has addressed the issue, then there is no basis for discarding that rule in the parent-subsidiary posture that the lower courts treated as dispositive in the Unisys-CS case. Other courts have applied the non-signatory rule to parties in that same posture. *Sunkist Soft Drinks*, 10 F.3d at 757-58; *J.J. Ryan & Sons, Inc.*, 863 F.2d at 320-21; *Vitzethum*, 1996 WL 19062; *In re Salomon Inc. Shareholders' Derivative Litig.*, No. 91 Civ. 5500 (RPP), 1995 WL 533595 (S.D.N.Y. Sept. 30, 1994); *cf. Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509 (9th Cir. 1988) (applying forum selection clause to non-signatory parent corporation). The close affiliation has indeed been treated as a reason militating in favor of applying the rule. *Vitzethum*, 1996 WL 19062, * 6 (fact that the signatory was a wholly-owned subsidiary of the non-signatory rather than simply an affiliate was a compelling reason supporting arbitrability).

This conflict in the circuits is reason enough to warrant granting certiorari in order for this Court to establish a uniform rule for extending arbitration clauses to non-signatory corporate affiliates. As a matter of *national* commerce, the sanctity of arbitration clauses should not turn on the circumstance of where a corporation is subject to personal jurisdiction. In addition, as a matter of *national* and *international* commerce, the parent-subsidiary posture is the most logical context for applying the non-signatory rule. Since a foreign subsidiary is usually the most efficient and sometimes the only mechanism for doing business in foreign markets, a non-signatory parent corporation will always be available as a litigation target. If non-signatory parents cannot avail themselves

of the arbitration mechanism required by the transactions about which they are sued, those clauses, as a practical matter, become meaningless.

IV. MULTINATIONAL CORPORATIONS HAVE NO MEANS OF CONTRACTING FOR BINDING ARBITRATION IN THE ABSENCE OF A BROAD NON-SIGNATORY DOCTRINE

If this Court adheres to prior precedent regarding the need for businesses participating in international commerce to be able to control prospectively where, and under what laws and procedures, disputes are to be decided, and agrees that multinational corporations must have some mechanism for insuring that such agreements cannot be avoided by tactical pleading, the question arises whether, in the absence of the practical non-signatory rule advocated by petitioner Unisys and *amici* on this brief, corporations could arrange their transactions to achieve those objectives.

According to the formalistic approach to contract interpretation and corporate identity articulated in *Dayhoff* and in the Unisys-CS case, the only type of prospective agreement to arbitrate that would insure that disputes involving a corporate affiliate of a contract party are directed to arbitration regardless of how the claim is pleaded would be (a) a contract signed by all entities comprising the corporation; or (b) a contract signed only by the parent, which would become the principal and sole signatory on all transactions. Requirement of either practice as a condition of controlling dispute resolution fora will throw current international business practice into turmoil. There are numerous business reasons for acting through a subsidiary in foreign markets, all of which will be negated if the corporate parent becomes a contract signatory.

It may be a legal impossibility for a United States corporation to be a contract party in some foreign countries. Some countries have a legal requirement that all entities doing business locally be licensed, incorporated and/or physically located in that country. Yitzhak Hadori, *The Structure of the Private Multinational Enterprise*, 71 Mich. L. Rev. 729, 761 (1973)(in some instances "domestic incorporation is obligatory"); P.T.

Muchlinski, *Multinational Enterprises and the Law* 44 (1995)("[T]he host state may use its regulatory power to require that the foreign firm supply the market through the licensing of a local firm.") Under that scenario, the United States corporate affiliate would have no legal right to join the contract, even if it does so in unison with a subsidiary.

More prevalent than such absolute obstacles to a United States corporation directly doing business in foreign countries are practical obstacles that require the use of a foreign subsidiary. Some countries levy such severe tariffs, import duties, or other conditions that a business subject to them cannot sell their products competitively in the market without a foreign subsidiary. P.T. Muchlinski, *Multinational Enterprises and the Law* 44 (1995) ("'[T]ariff jumping' has proved to be a significant historical reason for firms setting up production subsidiaries in host countries."); Cynthia Day Wallace, *Legal Control of the Multinational Enterprise* 69 (1982)("While the governments of developing states generally insisted on local production as a condition of entry, or imposed such high tariffs that a local plant became the only viable means of entry, the governments of industrialized nations might require purchasers under their direct influence . . . to agree to purchase their equipment only from companies with local plants, thus discouraging pure imports, licensing or assembly facilities, and encouraging local production.") Moreover, where much of the value added to a product occurs during assembly, a multinational can reduce import duties by having the domestic corporation export parts to the foreign subsidiary, which assembles the parts into a finished product in the host country. In addition, strategically located corporations can benefit from preferential treatment for exports and imports within certain regions. Nasrollah S. Fatemi, Gail W. Williams, Thibaut De Sain-Phalle, eds. *Multinational Corporations: The Problem and the Prospects* 38 (1976).

In addition to the legal and practical obstacles to having United States corporations directly sell into foreign countries, such a practice would damage numerous business practices currently authorized and encouraged by the law. For example, corporations establish subsidiaries to seize advantages, such as

low corporate income taxes, that foreign countries establish to induce foreign investment. Fatemi, *supra* at 38; Muchlinski, *supra* at 44 ("[T]he host state may relinquish its power to restrict entry and establishment and may offer investment incentives to induce the [multinational enterprise] to invest.")

United States corporations also receive a tax deferral of profits earned by subsidiaries until such time as those profits are repatriated back to the United States because only United States corporations, not their foreign subsidiaries, are considered subject to the taxing jurisdiction of the United States. I.R.C. §§ 61(7), 881-82; Fatemi, *supra* at 45, 130; Hadori, *supra* at 760. If a United States corporation was a signatory to a contract then it would be immediately subject to United States taxation for any income made on the project. Asim Bhansali, Note, *Globalizing Consolidated Taxation of United States Multinationals,* 74 Tex. L. Rev. 1401, 1403 (1996)("[A] corporation that conducts its foreign operations through a branch office rather than a subsidiary must pay current U.S. taxes on all of its income, without regard to source.")

Finally, high among the efficiencies achieved is protection of intellectual property. By utilizing foreign subsidiaries, a United States corporation is able to protect intellectual property rights by transferring its know how to a business entity, the subsidiary, which it owns, and which will have standing in the host country to assert claims on the patent. P.J. Buckley and M. Casson, *The Future of the Multinational Enterprise* 2 (1991); Muchlinski, *supra* at 431 ("[I]f the owner has the ability to do so, it may prefer direct investment over licensing, as this permits closer control over the use of the technology and is more likely to preserve its confidential nature."); Fatemi, *supra* at 38 (listing patent protection as a major factor motivating corporations to establish foreign subsidiaries).

It is likely that parties such as CS trying to resist arbitration would interpose that the multinational corporation must choose between the benefits that accrue to it by having subsidiaries exist as distinct entities, and the disadvantage of not being covered by the dispute resolution mechanisms contracted for by the subsidiary. The district court, quoting *Dayhoff,* stated that "there is no more reason to disregard the cor-

porate structure with respect to such claims as there would be to disregard it with respect to other legal matters." 1996 U.S. Dist. LEXIS, * 14. What this argument ignores is that in cases where the claim against the non-signatory is intertwined with the contract containing the arbitration clause, it is the plaintiff that has ignored the corporate structure by pleading its claim against a party with which it did not contract. That circumstance is particularly glaring in this case where CS has not even bothered to sue in any forum the corporate entity with which it did contract, and whose alleged failure to deliver is, by definition, the gravamen of CS's fraud suit in federal district court.

It cannot even be questioned that in a large transaction such as the one that the parties entered here, CS was aware that the products to be delivered were developed, manufactured, and marketed by numerous entities in the Unisys structure in addition to the small subsidiary with which CS contracted. The fact that CS contracted with a particular Unisys subsidiary reflects a commitment by *both* parties that CS's business and legal relationship is with that subsidiary, not other parts of Unisys' corporate structure. Accordingly, when disputes arise out of the transaction, the dispute is properly framed as between CS and the particular entity with which it contracted. What CS has done here is what the non-signatory rule is designed to stop: "escape enforcement of the arbitration agreement simply by suing the parent . . . rather than [the subsidiary]." *Vitzethum*, 1996 WL 19062, * 7; *see also Sam Reisfeld & Sons*, 530 F.2d at 681 ("If the parent corporation was forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.")

The non-signatory rule removes the incentive for parties committed to arbitration to disregard corporate structure in their pleadings for the purpose of avoiding arbitration, and thereby allows multinational corporations to adhere to the legal regulations and enjoy the business advantages that caused them to act through a foreign subsidiary, confident that the dispute resolution mechanism contracted for binds the transaction. In the absence of the rule, corporations have no

way of shielding their transactions from the "legal no-man's land", *Scherk*, 417 U.S. at 517, that would apply to most disputes arising out of contracts that were drafted with an intent to achieve legal certainty as to how disputes would be resolved.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNISYS CORPORATION,

Petitioner,

v.

CESKA SPORITELNA, A.S.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY TO BRIEF IN OPPOSITION

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DATED: December 11, 1997

12 pp

QUESTION PRESENTED

Whether a party to a contract, which has agreed to arbitrate all disputes arising out of the contract, may avoid arbitration by suing a non-signatory corporate affiliate of the contract party, rather than the corporate entity it contracted with?

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I. THIS COURT'S DECISION IN *FIRST OPTIONS V. KAPLAN* DID NOT ADDRESS THE APPLICABILITY OF ARBITRATION TO NON-SIGNATORIES

Respondent Ceska Sporitelna's ("CS") primary argument in response to Unisys Corporation's ("Unisys") petition seeking review of the lower courts' refusal to enforce an arbitration agreement with respect to a non-signatory corporate affiliate is that the issue of whether arbitration agreements should be extended to non-signatories has already been decided by the Court in *First Options v. Kaplan,* 514 U.S. 938 (1995). This interpretation of *First Options* defies a plain reading of the limited holding of that case, and underscores the need for the Court's review in this case.

In the Court of Appeals the *First Options* case did involve a dispute over whether an arbitration agreement should be extended to a non-signatory, although not in the parent-subsidiary context that the lower courts treated as dispositive here. *Kaplan v. First Options,* 19 F.3d 1503 (3d Cir. 1994). This Court, however, limited its review to two narrow procedural issues:

> (1) how a district court should review an arbitrator's decision that the parties agreed to arbitrate a dispute; and (2) how a court of appeals should review a district court's decision confirming, or refusing to vacate, an arbitration award.

First Options, 514 U.S. at 940. The Court expressly declined to review the lower court's substantive ruling. *Id.* at 949. CS's reliance on *First Options* is therefore incorrect. The issue raised in Unisys' petition is one of first impression for this Court.

II. THE THIRD CIRCUIT'S REFUSAL TO APPLY ARBITRATION CLAUSES TO NON-SIGNATORY CORPORATE PARENTS IS IN CONFLICT WITH THE PRACTICAL RULE DEVELOPED IN OTHER CIRCUITS

CS seeks to avoid the conflict between the Third Circuit's treatment of arbitrability of claims involving non-signatories, and the prevailing federal precedents extending arbitration clauses to non-signatories, by arguing that the decisions in other Circuits pre-date this Court's decision in *First Options,* which did not address the non-signatory issue, and by exaggerating minor factual distinctions among cases that do not explain the patent differences in doctrine. Response at 8. The "relatedness" or "involvement" theory, pursuant to which arbitration clauses are extended to non-signatory corporate affiliates whose conduct is related to or involved with the underlying contract, is the prevailing rule in most courts that have addressed the issue. *See Thomson-CSF, S.A. v. American Arbitration Association,* 64 F.3d 773, 779 (2d Cir. 1995) ("[T]he circuits have been willing to estop a signatory from avoiding arbitration with a non-signatory when the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed."); *Sunkist Soft Drinks v. Sunkist Growers,* 10 F.3d 753, 758 (11th Cir. 1993) ("The nexus between Sunkist's claims and the license agreement . . . leads us to the conclusion that the claims are 'intimately founded in and intertwined with' the license agreement [containing the arbitration clause]."), *cert. denied,* 513 U.S. 869 (1994); *Britton v. Co-Op Banking Group,* 4 F.3d 742, 747 (9th Cir. 1993)(the key issue was whether the non-signatory's alleged wrongdoing "relate[s] to or arise[s] out of the contract containing the arbitration clause"); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.,* 863 F.2d 315, 320-21 (4th Cir. 1988)("When the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement."); *Goodwin v. Ford Motor Credit Co.,* 970 F. Supp. 1007, 1016-17 (M.D. Ala. 1997) ("What is

necessary is that the claim against the non-signatory be inextricably bound up with the terms and duties of the contract the plaintiff has signed with the other defendant."); *Gulf Guaranty Life Ins. Co. v. Connecticut General Life Ins. Co.*, 957 F. Supp. 839, 841-42 (S.D. Miss. 1997) ("The Court finds that the doctrine of equitable estoppel should apply in cases in which a non-signatory seeks to enforce an arbitration agreement against a signatory to that agreement where the non-signatory is an agent of a signatory or where the claims against the non-signatory are 'intimately founded in and intertwined with' the agreement containing the arbitration clause.")(citation omitted); *Usina Costa Pinto, S.A. Acucar E Alcool v. Louis Dreyfus Sugar Co.*, 933 F. Supp. 1170, 1179 (S.D.N.Y. 1996) ("[B]ecause of . . . the integral link between the fraud claim and the underlying contractual obligations, [the] nonsignatory may invoke the arbitration clause."); *cf. Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 514 n.5 (9th Cir. 1988) ("[T]he alleged conduct of the non-parties is so closely related to the contractual relationship that the forum selection clause applies to all defendants."); *Texas Source Group v. CCH, Inc.*, 967 F. Supp. 234, 237 (S.D. Tex. 1997)("[Non-signatory's] relationship with the plaintiffs and the defendants is so inextricably intertwined that he should be subject to the forum-selection clause.") The failure of the District Court and Court of Appeals to follow this uniform doctrine has created a conflict in the Circuits on a matter of importance to the Federal Arbitration Act and to international commerce.

The fact that some of the courts invoking this practical rule found on the facts before them that the claims and contracts were not sufficiently intertwined to warrant applying the arbitration clause to the non-signatory, *see, e.g., Thomson-CSF, S.A., supra,* and *Britton, supra,* or that other cases that were directed to arbitration involved different facts than the instant case, Response at 9, does not obscure the serious conflict between the practical non-signatory doctrine applied in most circuits, and the formalistic rule requiring precise identity of contracting parties applied by the lower courts in this case. *Ceska Sporitelna, a.s. v. Unisys Corp.*, C.A. No. 96-4152, 1996 U.S. Dist. LEXIS 15435, * 17 (E.D. Pa. Oct. 10,

1996)("[T]he decision did not turn on the amount of involvement [the non-signatories] had with the License Agreement containing the arbitration clause but solely on the corporate relationship between [non-signatories and signatories]."), *aff'd without opinion,* 116 F.3d 467 (3d Cir. 1997). If this Court resolves the split in the circuits by endorsing the practical non-signatory doctrine applied by other courts in the federal system and advocated by Unisys here, it will create a uniform standard under the FAA that provides some certainty and predictability to international commercial contracts.

An example of the appropriate contours of such a non-signatory doctrine can be found in *Collins v. International Dairy Queen,* 169 F.R.D. 690, 693 (M.D. Ga. 1997) cited, selectively, at page ten of CS's Response. CS refers to a portion of that opinion in which the court denies the benefit of an arbitration agreement in certain subfranchisee agreements to non-signatory parties having a tangential corporate relationship to the franchise arrangements, but no other relationship with the sale or performance under those agreements. *Id.* at 693. CS omits, however, the discussion in the preceding paragraph wherein the court, relying on *J.J. Ryan* and *Sunkist,* extends the arbitration clause to a *non-signatory parent* of a contract signatory because of the close relationship between the conduct alleged against the parent and the agreements containing the arbitration clauses. *Collins,* 169 F.R.D. at 692-93. This is the precise circumstance presented here.

Collins incorporates in one decision the complete doctrinal framework urged by Unisys. Arbitration clauses should not be extended to non-signatories *solely* on the basis of some corporate or business relationship, but should be extended to affiliated non-signatories which have been accused of conduct inextricably intertwined with the contract containing the arbitration clause.

III. THE RULE ADVOCATED BY PETITIONER IS NECESSARY TO SECURE CONTRACTUAL COMMITMENTS TO ARBITRATION

CS relies on the uncontroversial proposition that arbitration agreements are creatures of contract as an absolute defense to Unisys' invocation of the arbitration clause. But the narrow, formalistic view of contractual obligations advanced by CS would, if accepted, completely vitiate all applications of the non-signatory rule, which exists in some form in every Circuit that has addressed the issue.

The non-signatory rule does not defeat contractual commitments, but rather secures them against tactical pleading. CS protests a nonmutuality to the non-signatory rule asserted by Unisys, but, in fact, under the lower courts' opinions it is CS that is free to manipulate its business relationship with Unisys to achieve the forum it desires. CS knew from the inception of the project that various entities in the Unisys structure would support the Unisys subsidiary that signed the contract with CS; indeed, the contract was marketed and negotiated by Unisys European subsidiaries other than the one with which CS contracted. According to CS's argument, all Unisys entities that participated in and supported the project were vulnerable to lawsuits from the inception of the business relationship, despite CS's commitment to arbitrate disputes arising out of the project.[1] CS, not Unisys, had the manipulable agreement to arbitrate: if it chose arbitration, it could sue the Unisys subsidiary with which it contracted; if it chose litigation, it could sue any of the other Unisys entities

1. CS alleges that "most of the misrepresentations by Unisys . . . were made in writing in documents that clearly identified Unisys Corporation as the speaker." Response at 5. By this statement, CS suggests that the transmittal of documents containing the Unisys logo by the Unisys subsidiaries with which CS did contract constituted a waiver of the arbitration agreement intended as the dispute resolution mechanism for the project, rather than simply a symbol of the fact that Unisys's subsidiary was providing CS with products and services developed by multiple components of Unisys' multinational enterprise. By its assertions, CS implies that the commitment to arbitration was a dead letter from the outset of the contract, defying common sense contract interpretation and business principles.

that participated in the transaction, without any meaningful distinction between the facts alleged in either action. Courts applying the non-signatory doctrine have invoked the practical doctrine of estoppel to deter such tactical pleading. *Sunkist,* 10 F.3d at 758 ("Sunkist is equitably estopped from avoiding arbitration of its claims [since] each claim presumes the existence of [the] agreement [containing the arbitration clause]."); *Hughes Masonry Co. v. Greater Clark Cty. Sch. Bldg. Corp.,* 659 F.2d 836, 841 (7th Cir. 1981)(since plaintiff "must rely on the terms of the . . . agreement in its claims [it] is estopped from repudiating the arbitration clause of this agreement").

In order to distinguish its claim against Unisys from the contract based claims it should have asserted in arbitration against the Unisys subsidiary with which it contracted, CS misrepresents the Complaint it filed in this action. CS asserts "independent fraudulent acts" other than, as Unisys characterized the complaint, "misrepresentations regarding its subsidiary's ability to deliver the computer system." But the "independent acts" described are all alleged misrepresentations inducing CS to enter into and remain in the relevant contracts, Response at 4, exactly as Unisys described, and as the Complaint explicitly states. *See* Complaint ¶ 2 ("The Defendant's misrepresentations and concealments, as specifically described in this Complaint, first persuaded the Plaintiff to select . . . [a] Unisys computer system . . . and then induced the Plaintiff to continue to pay large sums of money to Unisys subsidiaries, and not to terminate its relationship with Unisys."); Complaint ¶ 23 ("[I]n reliance on the aforesaid representations of Defendant Unisys, CS agreed, in June of 1992, to pay an estimated U.S. $90,000,000 to a second Unisys subsidiary, Unisys International Services, BV, to implement the delivery to CS of the Unisys System."); Complaint ¶ 32 ("[O]n March 31, 1994, in reliance on the aforesaid representations of Unisys, CS again agreed to pay a Unisys subsidiary to complete the installation of the Unisys System."). All these

allegations "presume the existence of [the] agreement [containing the arbitration clause]," and, therefore, are properly directed to arbitration.[2] *Sunkist,* 10 F.3d at 758.

2. CS further misrepresents its commitment to arbitrate by asserting that only three of the five contracts to procure a computer banking system contain an agreement to arbitrate. Those three contracts are the *only* contracts to procure a banking system; the other two documents, pleaded in lieu of the actual contracts in CS's complaint, were interim agreements, intended to serve solely as the framework for the official contracts, all containing arbitration clauses, which defined the relationships between the parties.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Unisys' principal brief, the petition for writ of certiorari should be granted.

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No. 97-594

In The

Supreme Court of the United States

October Term, 1997

UNISYS CORPORATION,

Petitioner,

vs.

CESKA SPORITELNA, a.s.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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15 pp

QUESTION PRESENTED

Whether a corporate defendant's petition to compel arbitration pursuant to the Federal Arbitration Act was properly denied where both parties admitted, and the district court found, that "there was no agreement between . . . [the parties] to submit this dispute to arbitration."

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RESPONDENT'S OPPOSITION TO MOTION OF FORD MOTOR COMPANY, EASTMAN KODAK COMPANY, AND SHELL OIL COMPANY FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Respondent Ceska Sporitelna, a.s. ("CS") hereby opposes the Motion of Ford Motor Company, Eastman Kodak Company, and Shell Oil Company For Leave to File Brief as *Amici Curiae* (the "Amici Motion") because their accompanying Brief *Amici Curiae* of Ford Motor Company, Eastman Kodak Company, and Shell Oil Company in Support of Petition for a Writ of Certiorari (the "Amici Brief") does not accurately state the facts of this case or the applicable law, and does not "bring to the attention of the Court relevant matter not already brought to its attention by the parties." *See* Supreme Court Rule 37.1.

The Amici Brief, admittedly prepared by Petitioner's own counsel and paid for by the Petitioner, *see* Amici Motion at n.1, also seeks to expand upon the mistaken legal arguments set forth in the Petition by making disputed and unsubstantiated factual claims about how multinational corporations supposedly do business. This has nothing to do with whether the parties to this case had a valid agreement to arbitrate affecting interstate commerce, however, and that is the sole criteria for arbitrability under the Federal Arbitration Act.

For all of these reasons, respondent CS opposes the motion for leave to file the Amici Brief, and respectfully requests that if it is to be considered, the Court also consider the responsive points set forth herein, and in the following Respondent's Supplemental Brief.

RESPONDENT'S SUPPLEMENTAL BRIEF

Respondent Ceska Sporitelna, a.s. ("CS") respectfully submits this supplemental brief, pursuant to Supreme Court Rule 15.8, to present its opposition to the arguments raised in the Amici Brief, which CS did not receive until after its "Respondent's Brief in Opposition" was filed.

As more fully set forth below, the Amici Brief is mistaken in claiming that there is some kind of federal "non-signatory doctrine" extending arbitration agreements to non-parties that never agreed to arbitrate. *See* Amici Brief at 6-7 (referring to an alleged "non-signatory doctrine" in other circuits). In fact, this Court has already held, in a directly applicable decision that the Amici Brief fails to cite or discuss, that the question of whether a non-signatory is bound to an arbitration agreement (or indeed any contract) is governed by state law contract principles (*e.g.*, agency, estoppel, etc.). *See First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate . . . courts generally . . . should apply ordinary state-law contract principles that govern the formation of contracts.").

The Amici Brief is also mistaken in its claim that arbitration agreements must be "extended" to non-parties in order for corporations to be able to prospectively establish dispute resolution mechanisms. *See* Amici Brief at 11-15. Such "extension" of arbitration agreements is not authorized by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"), is not permitted under this Court's decision in *First Options*, and would not be fair or rational — particularly in this case, where the Petitioner consciously chose not to agree to arbitrate with CS.

STATEMENT OF THE CASE

The Amici Brief materially misstates the facts of this case by repeatedly claiming that the action in the court below arises out of "a computer project that was sold under an agreement requiring all

disputes to be resolved through arbitration." *Id.* at 2. This is simply wrong, because as the district court noted in its opinion below (adopted by the Third Circuit), the Petitioner had the opportunity to agree to arbitration, but consciously chose not do so. *See* Appendix to Petition at 10a (district court opinion). Moreover, the European arbitration clauses that the Petitioner sought to invoke, which were contained in English law contracts to which the Petitioner was not a party, were substantively narrow, procedurally specific, and strictly limited to the contracting parties.

The Amici Brief also mischaracterizes the Third Circuit's decision as somehow holding that parent companies can never benefit from arbitration clauses in their subsidiaries' contracts. This is not the case. In fact, the district court specifically pointed out that "if Unisys 'wanted to be able to invoke the arbitration clause(s), (it) should have directed . . . appropriate language in (those) agreements allowing (it) to do so.' " Appendix to Petition at 10a (district court opinion).

The Amici Brief also mistakenly presumes that *all* lawsuits against corporate parents that have not agreed to arbitrate are brought for the purpose of avoiding arbitration with subsidiaries which have agreed to arbitrate, without regard for the myriad possible situations, including this one, in which the parent has committed independent acts of fraud. The Amici Brief also claims, without any basis whatever for doing so, that the action below is simply an attempt to "alleg[e] misconduct against an entity affiliated with the contract party" in order to avoid an arbitration, as if Unisys is merely a conveniently situated party to sue.

The reality, however, is that Unisys is alleged to have committed multiple independent acts of fraud against CS, Appendix to Petition at 17a (district court opinion) ("it does appear that an entire series of misrepresentations were made . . . by six of Unisys's representatives, including its Chairman and CEO"), and as the district court observed, "it is unlikely that an arbitration tribunal would even have jurisdiction over that claim." *Id.* In ignoring these

critical facts, the Amici Brief unfairly distorts the record, and in adopting the Petitioner's statement of the case, it compounds the problem because of the inaccuracies and omissions in that statement. *See* Respondent's Brief in Opposition at 2-6.

ARGUMENT

I.

THE ARGUMENT IN THE AMICI BRIEF THAT ARBITRATION CLAUSES MUST BE "EXTENDED" TO NONPARTIES IN ORDER FOR CORPORATIONS TO PROSPECTIVELY ESTABLISH DISPUTE RESOLUTION MECHANISMS IS ILL-FOUNDED.

The Amici Brief conspicuously raises an argument that the Petitioner is careful to avoid, which is that arbitration agreements should be "extended" beyond their parties in the international arena supposedly because "the personnel and resources of multinational corporations are . . . fluid," and "overlap the functions of the various entities in support of their products and services." Amici Brief at 3. Clearly, however, the amici would take the opposite view if it were suggested that they should be liable for their subsidiaries' contract obligations based such a "fluidity" claim, because as the Amici Brief explains, such subsidiaries are treated as separate legal entities. *Id.* at 12-13.

What the amici really want, therefore, is for this Court to extend to them the contractual arbitration rights of their subsidiaries, without extending to them the contractual obligations (including the obligation to arbitrate) of those subsidiaries — supposedly in the interest of ensuring what the amici call the "sanctity" of "prospectively crafted dispute resolution mechanisms." Amici Brief at 2. This is sophistry, and there no basis for it under federal law. Multinationals, like other entities, cannot demand contractual rights without assuming the concommitant contractual obligations, and when they seek to do so, their arguments ring hollow.

In this regard, the Petitioner has attempted to draw a clear distinction between itself and its subsidiaries, which is the normal approach of a parent company seeking to minimize its liability exposure by claiming, as the Petitioner did here, that its subsidiaries were completely separate entities. *See, e.g.*, Petition at 6 ("many of the alleged misrepresentations . . . were made by employees . . . of Unisys subsidiaries other than the parent Unisys"). Thus, the "fluidity" argument in the Amici Brief would be inapplicable here even if it had any validity, which it does not.

Finally, the record makes it quite clear that in this case, the Petitioner took a series of specific steps to "prospectively" ensure that it could never be compelled to arbitrate. First, it avoided becoming a party to any of the European contracts that contained the limited arbitration provisions. Second, when it issued a guarantee of one of those contracts, it expressly provided that any disputes as to its guarantee obligations would be decided in court, not in arbitration. Third, it did not enter into any agreements with CS as to how or where any other claims against it would be adjudicated. Fourth, it carefully attempted to maintain its position as an entity separate and apart from the European entities with which CS contracted at various times.

Under these circumstances, the argument that this Court should review this case to ensure that corporations can "determine prospectively the forum for disputes," Amici Brief at 4, is ill-founded and inapplicable. The Petitioner voluntarily chose to insulate itself from any contractual obligation to arbitrate with CS, and it makes no sense for this Court to be asked to reverse the effect of that particular decision in order to ensure the "sanctity" of such decisions generally.

II.

THE AMICI BRIEF IS MISTAKEN IN ARGUING THAT THERE IS SOME KIND OF FEDERAL "NON-SIGNATORY DOCTRINE" EXTENDING ARBITRATION AGREEMENTS TO NON-PARTIES.

Both the Amici Motion and the Amici Brief mistakenly suggest that there is some kind of federal "non-signatory doctrine" extending arbitration agreements to non-signatories where those non-signatories are allegedly "involved" in the activities in issue. *See* Amici Motion at 2 (claiming that there is a "non-signatory doctrine" adhered to by other courts of appeals); Amici Brief at 6-7 (referring to an alleged "non-signatory doctrine" in other circuits).

In fact, there is no such doctrine, because the question of whether a non-signatory is bound to an arbitration agreement (or indeed any contract) is governed by state law contract principles (*e.g.*, agency, estoppel, etc.), and this Court has so held in a clearly applicable decision that the Amici Brief does not cite or discuss. *See First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate . . . courts generally . . . should apply ordinary state-law contract principles that govern the formation of contracts."). *See also Eassa Properties v. Shearson Lehman Bros., Inc.*, 851 F.2d 1301, 1304 n.7 (11th Cir. 1988) ("While federal law may govern the interpretation and enforcement of a valid arbitration agreement, state law governs the question of whether such an agreement exists in the first instance.").

As the Second Circuit noted in *Progressive Cas. Ins. Cos. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 46 (2d Cir. 1993):

> [W]hile § 2 of the [Federal] Arbitration Act preempts state law which treats arbitration agreements differently from any other contracts, it also "preserves general principles of state contract law as rules of decision on

> whether the parties have entered into an agreement to arbitrate"

(Emphasis added). *See also Gruntal & Co., Inc. v. Steinberg*, 854 F. Supp. 324, 334 (D.N.J. 1994) ("Because arbitration is a matter of contract, the existence vel non of a valid agreement to arbitrate will be governed by state law principles governing contracts generally"), *aff'd without op.*, 46 F.3d 1116 (3d Cir. 1994).

By ignoring this state law component of the analysis, the Amici Brief mistakenly suggests that the question of whether the Petitioner should be treated as if it were a party to the European arbitration clauses in issue (when it admits that it was not a party to those agreements) should be heavily influenced by a "liberal federal policy" in favor of arbitration. Amici Brief at 4. This approach would stretch the FAA beyond what Congress intended, however, because as the Second Circuit has pointed out, "[t]he purpose of the Federal Arbitration Act was to make arbitration agreements as enforceable as other contracts, *but not more so*." *McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co.*, 858 F.2d 825, 831 (2d Cir. 1988) (emphasis in original). *See also Beckham v. William Bayley Co.*, 655 F. Supp. 288, 291-292 (N.D. Tex. 1987) ("The strong federal policy that favors resolving doubts about an arbitration clause in favor of arbitration cannot serve to stretch a contractual clause beyond the scope intended by the parties").

This Court has specifically held, in a decision the Amici Brief ignores, that "arbitration is simply a matter of contract between the parties," and that "arbitrability . . . depends on whether the parties agreed to arbitrate that dispute." *First Options of Chicago v. Kaplan*, 514 U.S. 938, 943 (1995). In this case, the Petition admits, and both the district court and the Third Circuit found, that under the applicable state law contract principles, the parties never agreed to arbitrate this or any other dispute. In supposing that there is some kind of federal "non-signatory doctrine" that should override this fact, the Amici Brief is mistaken.

III.

THIS COURT'S DECISION IN *FIRST OPTIONS* ALREADY PROVIDES THE PREDICTABILITY THAT THE AMICI BRIEF CLAIMS IS LACKING.

As with Unisys' Petition, the Amici Brief fails to mention this Court's recent and controlling decision in *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995), in which this Court clearly held that "arbitration is simply a matter of contract between the parties." *Id.* at 943. CS has already addressed the applicability of *First Options* to the present case, *see* Respondent's Opposition at 7-8, but several of the points raised by the Amici Brief on this issue warrant a brief further response.

First, the Amici Brief misconstrues the Third Circuit's holding in *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110 (3d Cir. 1993), because in that case, the Third Circuit simply held that where "a principal is bound under the terms of a valid arbitration clause," the "agents, employees and representatives" of that principal "are also covered under the terms of such agreements." *Id.* at 1121. This means no more than, as this Court stated in *First Options*, that "[w]hen deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944.

In other words, the Third Circuit's pre-*First Options* decision in *Pritzker* provides for the narrow exception under state law where an agent can enforce its principal's arbitration agreement. No such situation is presented here, as Unisys has never claimed to be the agent of the remote subsidiary with which CS contracted.

Second, the Amici Brief misreads the Third Circuit's post-*First Options* decision in *Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d 1287 (3d Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 583 (1996), in attempting to draw a distinction between the two groups of

defendants in that case (the Heinz defendants and the Hershey defendants) which the Third Circuit did not draw or rely on. The Amici Brief claims that *Dayhoff*'s treatment of the Hershey defendants "which had no involvement with the contract negotiation and performance" somehow "fits cleanly within the prevailing application of the non-signatory rule, as the conduct alleged [against Hershey] was subsequent and external to the contracts containing the arbitration clause." Amici Brief at 9.

Nowhere in *Dayhoff* is this distinction between the various defendants supported, however. In fact, the Third Circuit did not engage in the "intertwining" analysis advocated by the amici precisely because of this Court's decision in *First Options* one year earlier. Relying on *First Options*'s clear statement that "arbitration is simply a matter of contract between the parties," *Dayhoff*, 86 F.3d at 1294 (quoting *First Options*, 115 S. Ct. at 1924), the Court answered the amici's concerns regarding Heinz in stating

> If Heinz Italia and H.J. Heinz wanted to be able to invoke the arbitration and forum selection clauses, they should have directed Heinz Dolciaria [the signatory subsidiary] to include appropriate language in the 1989 and 1990 agreements allowing them to do so.

Dayhoff, 86 F.3d at 1297.

Third, the amici are incorrect when they state that the district court's decision turned exclusively on its interpretation of the parent-subsidiary language in *Dayhoff*. Amici Brief at 9-10. As the district court explained in its decision below in this case:

> [I]t appears from the *Pritzker*, *Kaplan* and *Dayhoff* line of cases that only where the signatories and non-signatories first share a principal/agent relationship does it matter whether the non-signatories and signatory's interests are co-extensive so as to make the arbitration clause applicable to the non-signatory.

Appendix to Petition at 10a. Clearly, the district court looked not merely at the "formalistic" parent-subsidiary relationship between the Petitioner and its European affiliate, but instead at the question of whether the kind of agent-principal relationship stated in *Pritzker* was present.

Finally, the Amici Brief's brief citation of other circuit cases (which it mistakenly claims are "inconsistent" with the Third Circuit's decision here) is already addressed in Section II of the Respondent's Brief in Opposition at pages 8-12, which is incorporated here by reference.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Respondent's Brief in Opposition, the Petition for Writ of Certiorari should be denied.

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